EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 9269

United States Circuit Court of Appeals

For the Ninth Circuit.

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY WILHELMINA ABRAHAMSSON,

Appellants,

vs.

AMERICAN NATIONAL RED CROSS,

Appellee.

Transcript of Record

Upon Appeal from the District Court for the Territory of Alaska Division Number One

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9269

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Appeal:
- Assignments of Error on 40
- Bond on 48
- Citation on 47
- Notice of 3
- Order allowing 39
- Petition for 37
- Statement of points on 70

Assignments of Error 40
Attorneys of record, Names and addresses of 1
Bill of Exceptions (for detailed index see "Testimony") 53
Citation 47
Clerk's Certificate 74
Conclusions of Law 33
- Exceptions to 36

Conclusions of Law (Proposed by claimants) 66
Cost bond on appeal 48
Decision of District Court 5
Decree 34
- Exceptions to 36

Index

Page

Decree and Order (Proposed by claimants) 66

Exceptions to Findings, Conclusions and Decree 36

Findings of Fact and Conclusions of Law 31

Exceptions to 36

Findings of Fact and Conclusions of Law (Proposed by claimants) 63

Notice of appeal 3

Order allowing appeal 39

Order allowing bill of exceptions 68

Order approving cost bond on appeal 51

Order of Probate Court setting aside purported will 1

Petition for appeal 37

Praecipe 72

Statement of Points on appeal (District Court) 70

Stipulation re exhibits 52

Stipulation re printing transcript 51

Testimony 53

Conclusion of Law (Proposed by claimants) 66

Decree and Order (Proposed by claimants) 66

Exhibits for appellant:

1—Purported will or memorandum 54

3—Letter dated April 7, 1938 to H. J. Hughes from John Edgar Hoover 55

Index Page

Exhibits for appellant: (cont.)
4—Violet-ray copy of memorandum or purported will contained in Exhibit 1 [Not set out] 56

Findings of Fact (Proposed by claimants) 63

Witnesses for appellants:
McNaughton, Guy
—direct 53
—cross 55
—recalled, direct 57

Witnesses for appellee:
Coughlin, Robert E.
—direct 62

McNaughton, Guy
—direct 57

Monagle, M. E.
—direct 60

Morrison, John, Jr.
—direct 59
—cross 60

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Attorney for Appellee.

In the Commissioner's Court for the Juneau Precinct, Division Number One, Territory of Alaska.

Before Felix Gray, United States Commissioner, and Ex-Officio Probate Judge.

In the Matter of the Estate

of

GUSTAF LANART, Deceased.

ORDER SETTING ASIDE PURPORTED WILL ADMITTED TO PROBATE, AND DECREE ADMITTING THE CLAIMS OF ERIK ENAR KRISTER LOVSKOG, AND SVANHILD SALLY VILHELMINA ABRAHAMSSON, AS SOLE HEIRS.

Now at this time, this matter coming on regularly for a hearing upon the motion of Guy McNaughton,

administrator of the estate of Gustaf Lanart, deceased, and in accordance with and Order and Citation issued by this Court under date of December 17, 1937, for a hearing set for 10.00 A.M. January 31, 1938, and at which time the case was called, and upon the recommendation of the attorneys in the matter, the hearing was postponed until 2.00 P.M. February 9, 1938, and at which time the hearing was held. The motion filed by Attorney H. L. Faulkner on January 25, 1938 to set aside the Will, and asking for a decree in favor of the heirs, a brother and sister of the deceased, was argued for at length by H. L. Faulkner and Grover C. Winn, attorneys for the heirs, and submitted testimony of three witnesses and offered three exhibits #1, #2, #3 in support of his argument. Following which, Attorney Frank H. Foster, representing the American Red Cross Society, argued for his petition that Letters Testamentary be forthwith issued by the Court to Guy McNaughton, as administrator, in accordance with the Order of the Court admitting the Will to probate on August 10, 1937, and that the action of the Court, at that time be sustained and remain in full force and effect.

Now therefore, it appearing to the Court, that there is some reasonable doubt as to the purported Will, and that [1*] the legal claims of the sister and brothers as heirs is sufficiently proved and established, in consequence thereof:

*Page numbering appearing at the foot of page of original certified Transcript of Record.

It is hereby adjudged and ordered, that the purported Will as admitted to probate on August 10, 1937, be set aside and the Letters Testamentary with Will Annexed issued on that same date be revoked, and furthermore,

It is hereby decreed that Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson, a brother and sister of the deceased, are legally the sole heirs.

Witness my hand and the seal of this court, this 9th day of February, 1938, at Juneau, Alaska.

[Seal] FELIX GRAY
United States Commissioner
and Ex-Officio Probate Judge.

[2]

In the United States Commissioner's Court in and for Juneau Precinct, First Division, Territory of Alaska.

(In Probate)

In the Matter of the Estate of
GUSTAV LANART,
Deceased.

NOTICE OF APPEAL.

To Faulkner & Banfield and Grover C. Winn, Attorneys for Erik Einar Kristar Lofskog and Sally Vilhelmina Abrahamson:

Comes now American National Red Cross Society as legatee under the Will of Gus or Gustav

Lanart and claimant to the estate of said Lanart, deceased under said Will, and gives notice of appeal to the District Court of the Territory of Alaska, First Division, from a certain order and decree made and entered in the Matter of the Estate of Gustav Lanart, deceased, after a hearing had on the 9th day of February, 1938 upon citation of the above named Probate Court and upon the Motion to set aside an order admitting will to probate which said motion was filed in said above named court by Faulkner and Banfield and Grover C. Winn on January 25th, 1939, said order appealed from being entitled "Order Setting Aside Purported Will Admitted to Probate and Decree Admitting the Claims of Erik Einar Krister Lofskog, and Svanhild Sally Vilhelmina Abrahamson, as sole heirs thereto."

This appeal is taken by appellant American National Red Cross Society from the United States Commissioner's, ex-officio Probate Court of Juneau Precinct, First Division, Territory of Alaska to the District Court of the Territory of Alaska, First Division, and is based on [3] questions of both law and fact.

Dated at Juneau, Alaska, the 21st day of February, 1938.

FRANK H. FOSTER
Attorney for American National
Red Cross Society, Appellant.

Received service of the above Notice.

FAULKNER & BANFIELD,

By M. WENDLING.

[Endorsed]: Filed Feb. 21, 1938. [4]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 4182-A.

In the Matter of the Estate

of

GUSTAF LANART,

Deceased.

MEMORANDUM DECISION

This is an appeal from the court of the United States Commissioner (and ex-officio Probate Judge) for the Territory of Alaska, Juneau Commissioner's Precinct in the above entitled matter, from an order entitled "Order Setting Aside Purported Will Admitted to Probate and Decree Admitting the Claims of Erik Einar Krister Lofskog and Svanhild Sally Vilhelmina Abrahamson as sole heirs thereto," made by the judge of said court on February 9, 1938.

It appears from the proceedings had in the Commissioner's court that a petition for Letters of Administration was filed on December 31st, 1936 and

pursuant thereto Guy McNaughton was duly appointed and qualified as Administrator of said estate. That thereafter, on July 27, an instrument purporting to be the holographic will of the deceased was filed with petition for probate. Thereafter, on August 10, 1937, hearing was had for proof of the will, and on the same date an order entered admitting the document in question to probate as the last will and testament of the deceased and letters testamentary issued.

Thereafter a petition was filed on behalf of Erik Einar Krister Lofskog and Svanhild Sally Vilhelmina Abrahamson, attacking the validity of the document theretofore admitted to probate as the will of the deceased [5] and claiming the estate of deceased as the brother and sister and only heirs of the deceased. Hearings were had thereon and on February 9, 1938 an order was entered setting aside the probate of the purported will and decreeing the claimants to be the rightful heirs of said estate.

From this decree appeal was taken by the American National Red Cross to this court.

The questions involved in this appeal are:

First: Whether or not the purported holographic or olographic will of deceased first admitted to probate by the Commissioner and ex-officio Probate Judge and later set aside by him, is a valid will.

Second: Whether it is sufficient to bequeath the property of the deceased to the appellant American National Red Cross.

An "holographic will" as described and defined in Ruling Case Law, Vol. 28, under Section 16 of "Wills", is: "One entirely written, dated and signed by the testator in his own handwriting."

Our law expressly recognizes holographic wills, and provides how they may be proven. Section 4624 C.L.A. 1933:

> "Holographic Wills. How Proved. Holographic wills, with or without attestation, shall be admitted to probate the same as other wills and be proved in the same manner as other private writings."

The document in question meets all the requirements of our law. The entire document is admittedly written, dated and signed wholly in the handwriting of the testator in conformity with our statute, and should be considered together as one document.

The uncontradicted testimony shows, and the Court [6] finds, that the purported will is "one entirely written, dated and signed by the testator in his own handwriting"; that the testator was at the time qualified under our law to make a will, being of sound mind, over twenty-one years old, and not acting under any fraud, duress or undue influence, and that said instrument was duly proved as provided by law, as the last will and testament of

Gustaf Lanart, deceased, and entitled to probate as such.

Having determined that the document in question is an holographic will and that the testator was qualified to make a will under our law, we pass to the discussion of the wording of the instrument and whether or not it is sufficient to dispose of the testator's estate. This, of course, will have to be determined by the general rules governing the construction of wills.

As has already been pointed out, "Aside from the requirement as to writing, date and signature, an holographic will is subject to no other form. It is sufficient if the writing expresses, however informally, a testamentary purpose in language sufficiently clear to be understood."

Ruling Case Law makes this statement of the law:

> "The cardinal rule of testamentary construction is to ascertain the intent of the testator and give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. All rules of construction are designed to ascertain and give effect to the intention of the testator and all rules or presumptions are subordinate to the intent of the testator where that has been ascertained. The intention will control any arbitrary rule, however ancient may be its origin, unless the testator attempts to effect that which the law forbids."
>
> 28 R.C.L. Sec. 173, pp. 213-14.

And again: [7]

> "The intent of the testator is to be collected from the whole will and from a consideration of all the provisions of the instrument taken together rather than from any particular form of words. The intention is not to be gathered from detached portions alone, and the court should not consider merely the particular clause of the will which is in dispute. The language employed in a single sentence is not to control as against the evident purpose and intent as shown by the whole will. In other words, a will is not to be construed per parcella but by the entirety. As sometimes expressed, the intent is to be ascertained from a full view of everything within the four corners of the instrument. If the whole will clearly indicates what was the testator's intent the rules of law which aid in the construction of wills need not be invoked."
>
> 28 R.C.L. Sec. 175.

The policy of the law is to uphold wills and to make them valid and effective if that can be done. In doing so the courts have gone to great lengths and have repeatedly held that the intent of a testator need not be declared in express terms. Quoting again from Ruling Case Law, we find this statement:

> "The intent of the testator need not be declared in express terms in the will but it is sufficient if the intention can be clearly in-

ferred from the particular provisions of the will and from its general scope and import. The courts will seize upon the slightest indications of that intention which can be found in the will to determine the real objects and subjects of the testator's bounty. The clear intention of the testator should prevail although it would require some departure from the literal construction of one of the clauses in the will. The general pervading purpose of the testator may override any inconsistent specific provisions found in the will, and it has been held that the testator's particular intent, as shown by a single provision standing by itself, must yield to the general leading intent as manifested in the whole instrument. In the interpretation of a will the dominant or primary intention, gathered from the whole thereof and all its provisions, must be allowed to control, and a particular and minor intent is never permitted to frustrate a general and ulterior object of paramount consideration. ACCORDINGLY IN INTERPRETING WILLS FAVOR WILL BE ACCORDED TO THOSE BENEFICIARIES WHO APPEAR TO BE THE SPECIAL OBJECTS OF THE TESTATOR'S BOUNTY."

28 R.C.L. Secs. 177-178. [8]

"In the construction of wills the object is not to seek flaws and declare them invalid, but

to assist them if legally possible, and the presumption is that the testator intended a lawful rather than an unlawful things. Therefore where the language used in the will is reasonably susceptible of two different constructions, one of which will defeat, and the other sustain, the provisions, the doubt is to be resolved in favor of the construction which will give effect to the will rather than the one which will defeat it."

28 R.C.L. Sec. 167.

"The rules of construction are to be employed only when doubt exists and when a testator employs language that is clear, definite and incapable of any other meaning than that which is conveyed by the words used there is no reason for resorting to rules of construction."

28 R.C.L. Sec. 165.

An excellent collection and digest of the cases pertaining to the construction of holographic wills is found in a note following the case of Estate of Fay in 104 American State Reports at pages 22-34. In that note at page 24, under the heading, "What Writings Amount to" (Holographic Wills) it is stated, on authority cited:

"It is sufficient that he (the testator) manifests his wish that, on his death, his property, or some part of it, shall go to another person by him designated."

Holographic wills being made by the testator himself without the aid of experienced or professional help should, from their very nature, be more liberally construed than ones prepared by practical hands. If it were otherwise few if any holographic wills would ever be sustained. Furthermore, our statutes not only recognize them but apparently favor them, and there is ample reason why this is so. This is a large territory, approximately one-third the size of the United States proper; sparsely settled by small settlements and with great distances between them. The major part of our population is made up [9] of miners and fishermen living and working in remote places, alone or in small groups, often under the most rigorous climatic conditions and having only the most primative means of transportation. The action of our legislature in this regard is therefore not only logical but reflective of the actual necessities of our conditions, for probably nowhere else in the world do conditions so necessitate the aid of both the courts and the legislature in making it possible for its citizens to make testamentary disposition of their property in the simplest manner.

That it was intended by him to be his last will and testament is also borne out by the wording of the document itself. It begins by stating that "After death" (showing it to have been made in contemplation of death) "forward all to Red Cross"; and in another place he calls it his "will." The testator then gives his reason for making the

Red Cross the recipient of his bounty, viz. "As I don't think any relatives are alive and the (they) might be able to do some good with the little I have."

Some question has been raised by counsel on both sides as to the wording of the instrument, claiming that some of it is illegible. I do not, however, agree. If the instrument is put under a strong reading glass and examined (as I have done) I think it can be read in its entirety without difficulty.

Counsel for the claimant heirs contends that the document under consideration is not a will "for the testator does not GIVE, DEVISE nor BEQUEATH anything to anybody; he does not use any words or language in the document which have that meaning."

There is no merit in this contention. It is not necessary that any testamentary or other technical words [10] be employed. Ruling Case Law, Vol. 28 Sec. 116 states the law thus:

> "Aside from the requirement as to writing, date and signature an holographic will is subject to no other form. It is sufficient if the writing expresses, however informally, a testamentary purpose in language sufficiently clear to be understood."

Our statute also provides, (Sec. 4639 C. L. A. 1933):

> "Construction of Wills. Testator's Intent to be Carried Out. All courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent

and meaning of the testator in all matters brought before them."

Counsel for the claimant heirs also takes exception to the word "forward" used in the will, and it is contended that the testator not only failed to use any of the legal testamentary terms but does not even say that he "gives."

As already pointed out holographic wills are not required to be in any particular form, but any language used expressing the intentions of the testator is sufficient.

"Forward" according to the authorities, means to send forward—to send toward place of destination; to transmit.

(Webster's Dictionary;
3 Words & Phrases, 3d series 755;
Nicolleti vs. Bank of Los Banos, 214 Pac. (Cal.) 51-52)

It also means or implies to send or transmit the identical thing—that which is delivered for that purpose; and "forward" has been held to mean, as applied to a package of currency delivered to an express company for that purpose, "that the company should carry and deliver the package to its destination.

3 Words & Phrases 2926;
Reed vs. U. S. Express Co. 48 N. Y. 462;
8 Amer. Reports 561.

Furthermore, the wording of the will should be read in the light of the circumstances surrounding

the testator at the time, as disclosed by the evidence in the case. [11]

The testator was an ignorant, illiterate man. His entire estate consisted of cash (money in bank) and stocks or bonds. There was no real estate to be sold nor even personalty that needed to be converted into cash. Everything that he owned could be simply gathered up and "forwarded" in its then condition, without further trouble, and he apparently had the idea, as many people do, that nothing more was necessary to effectuate his intention of bestowing his estate upon the object of his bounty, the Red Cross, or American National Red Cross. That, in any event, is the view of this court, and one of the conclusions upon which we have determined the real intention of the testator.

The other pertinent facts appear to be substantially as follows:

The deceased, Gustaf Lanart, whose true name, according to his Declaration of Intention to become a citizen of the United States, was Gustaf Lanart Lafskog, was born on March 15, 1873 at Alghult, Sweden, and according to the same authority he arrived at Philadelphia about April 13, 1906. He later came to Alaska where he has lived since about April 1, 1912, and became a naturalized citizen of the United States at Juneau, Alaska on December 16, 1918.

On or about December 10, 1936, the body of Gustaf Lanart was found at or near his cabin at

Gambier Bay, Alaska. For many years Lanart had lived and been employed as a watchman by the Pacific American Fisheries at its cannery there and had lived on a wanigan at or near the cannery. The cannery had been closed for many years, and since then Lanart had led a solitary and lonely existence as a watchman there, relieved only by visits from chance passers-by and occasional trips to Juneau for supplies, or [12] on business. About December 1, 1936 Lanart made a trip to Juneau (about a hundred miles from Gambier Bay) during which trip he deposited or left with the B. M. Behrends Bank there a tin box for safe keeping. This box was later found to contain bank books, stock certificates, etc. showing him to be the possessor of an estate of about $8,000.00 in money and stocks.

Following the finding of Lanart's dead body the United States Commissioner at Juneau was notified, and accompanied by Messrs. Guy McNaughton and M. E. Monagle, the Commissioner proceeded to that place, and while there was given the little book in which was written what is now claimed to be the holographic will of Gustaf Lanart, now in question.

The will had been found in a small black grip floating in the water in Lanart's cabin on the wanigan which had sunk, and contained, besides the will in question, receipts and other valuable papers belonging to the deceased.

It also appears from the testimony and record in this case that the deceased led a lonely and desolate existence far removed from any of his relatives, including the claimants, and that he had not even heard from them for so many years that he states in the disputed document, "I don't think any relatives are alive."

All of the witnesses agree that he was, or appeared to be, a man past sixty years of age, and the fact that he made this purported will commencing with the words "After death" is at least presumptive proof, of the fact, that at his age and in his condition he contemplated death and intended to dispose of his property. No better proof of his lack of education and general ignorance of the prerequisites of disposing of his estate in a legal and orderly [13] manner is necessary than the instrument itself. From it we gather the general conclusion that it was written in contemplation of death and that he thereby intended to dispose of his estate. Wishing to do some good with what he had, and having no particular friends to whom he cared to leave his estate, and believing as he apparently did and as he states in the instrument, that he had no relatives living, and apparently casting about for a beneficiary upon whom to bestow what estate he had, that would do some good with it, he must have thought of the Red Cross as an agency or organization that did a lot of good in the world, and he therefore designated it as the

object of his bounty. This too is borne out by the language of the instrument itself, in which he recites, "Please forward all to Red Cross * * * The (they) might be able to do some good with the little I have." Twice in the instrument the word "the" is used instead of "they" which he undoubtedly intended.

Lanart probably was ignorant of the legal name of the Red Cross, but knew it as thousands of others know it, by the name "Red Cross" and not "American National Red Cross," its real name. However, such a lack of knowledge as to the legal name of the Red Cross should not affect the validity of his will. The Red Cross is known throughout the world as a charitable organization, and there is only one Red Cross in this country that has the legal capacity to accept such a bequest and that is the American National Red Cross. It is the only Red Cross that deceased could have had in mind and the only one that he could have intended to make his beneficiary.

To contend, as do the claimant heirs, that he might have just as well meant the Canadian Red Cross or the Swedish Red Cross is, to our mind, wholly without [14] merit. The testator had never even been in Canada, so far as anyone knows, and he had been away from Sweden for more than thirty years; had no relatives living there as he apparently believed, from the wording of his will, and had long since severed all ties with that country.

He had lived in America for thirty years and had become an American Citizen nearly twenty years before his death, and it stands to reason that the only Red Cross he could have had in mind was the American Red Cross or the American National Red Cross, that being the only American organization known as "Red Cross" capable of accepting his bounty and it is inconceivable that he could have had any other Red Cross in mind.

Furthermore the apparent intent of the testator was to make a charitable gift or bequest to the Red Cross, and charitable gifts and bequests have always been favored by the law.

> "The doctrine early became crystallized as a part of the common law of England that gifts to charitable uses should be highly favored and construed by the most liberal judicial rules, rather than that the gifts should fail and the intent of the donor fail of accomplishment. Charitable bequests are therefore liberally construed to carry into effect the intention of the testator and every presumption consistent with the language used will be indulged to assist."
>
> 28 R. C. L. Sec. 172.

The case most nearly in point that has been called to my attention or that I have been able to find is American Bible Society et al vs American Colonization Society et al. decided by the Supreme Court of New York, Vol. 1-2 N.Y.Sup. p. 774.

This was an action to construe the will of Sarah Bunce deceased. The court below entered judgment denying the American Colonization Society the right to recover a [15] portion of the estate of testatrix, and that society appealed. The facts requisite to an understanding of the case are as follows:

Sarah Bunce died in *1851* leaving a will dated July 16, 1833 and a codicil thereto dated October, *1859*. The material part of the codicil on which the question in this case arises is as follows: "Sixthly: I give to my beloved niece Sarah B. Munsell and her husband Harry H. Munsell, for their joint lives my house and lot number 18 10th Street. On their death I direct the same to be sold by my trustee or any person to be appointed by the proper tribunal, of the State of New York, and the proceeds divided evenly among the following societies, to-wit: The American Bible Society, The American Tract Society, the New York Seamens' Friends Society and the American Colonization Society, all of or in the City of New York.

Macomber J. in delivering the opinion of the court said (inter alia):

> "The right of the appellant American Colonization Society to the remaining one-fourth is contested by the other defendants, who are the next of kin of the testatrix, upon the ground that the appellant is not the beneficiary designated by the codicil.

The American Colonization Society existed as an unincorporated institution from about the year 1816 to the year 1831, when by an act passed at that time and by an amendatory act of 1837 it was incorporated by the legislature of the State of Maryland. It has always been known as a national organization, having auxiliaries in nearly all, if not all, of the states of the Union, with headquarters at Washington, D. C. It has never been known by any other name than the American Colonization Society.

There is no question or dispute made in regard to the identity of this particular corporation which asks for this portion of the estate of the deceased. Its identity is as distinctly established as that of either of the counsel in this case. Why then, the question arises, did the trial court refuse to award a portion of the decedent's estate to it? [16]

If its judgment can be maintained at all it must be upon the statement of the learned judge at the special term, who says: 'It is quite obvious that the testatrix intended that the bequest should not be to the appellant American Colonization Society but to the society which was organized in the State of New York as an auxiliary society.' There was a New York State Colonization Society which existed as an unincorporated institution long before, and

for six years after the execution of the codicil of the testatrix, and which was finally organized under that name by an act of the legislature of New York (Laws of 1853 p. 376).

The last named society was, of course, at the time of the writing of the codicil, incapable of taking the legacy because it was not incorporated, and consequently had no legal existence. Nor was it incorporated afterwards until after the death of the testatrix.

No argument is presented by the respondents denying the appellant's ability to take and hold bequests, but the contention in their behalf is simply that it is not the party designated in the will. It is to be observed that the expression 'all of or in the city of New York' is in no sense a part of the name of either of the corporations named in the instrument. Had the codicil said 'The American Colonization Society of the City of New York' some reasonable ground would be offered for the position taken by counsel for the next of kin of the testatrix.

Generally the designation of a corporation as being of a certain place constitutes a part of its legal name for the transaction of business, but in this instance there is no designation of the American Colonization Society as being of the City of New York. The expression used,

'all of or in the city of New York' is in the alternative, meaning a corporation either existing by law with headquarters at the city of New York, or having its headquarters elsewhere with a place of business in the city of New York, conducted by its agents or otherwise. But was not the appellant in every material sense in the City of New York within the meaning of the term which was evidently in the mind of the testatrix?

It was established by the evidence without dispute that the New York Colonization Society, both before and after incorporation, was a mere hand or means to enable the parent society, the American Colonization Society, to carry on its business which was the colonization of free colored persons upon the coast of Africa.

It was shown that the agents of the American Colonization Society organized the local society of the State of New York. Nearly all of [17] the expeditions carrying emigrants to Liberia sailed from the port of New York. All of the monies collected by the New York Colonization Society were forwarded to the American Colonization Society in Washington and expended by that corporation, and none of them were disbursed by the local or auxiliary society in the City of New York. Such also was the practice in other, if not all, of the states of the Union.

As the chief witness in the case says, the state organizations, whether incorporated or otherwise, were but the hand or agent by which the parent society conducted its work. Each of the state societies had representation under the rules established by the American Colonization Society fixed at the rate of one delegate to the annual conventions for every sum of $500.00 subscribed in the particular state. Hence it is that if the parent society were obliged to show that it was in a literal sense in the city of New York, we think the evidence was sufficient to warrant the testatrix's use of that expression as a matter of description of the objects of her bounty.

But it is not necessary to put our decision upon that ground. It is sufficient that the appellant appears as the accurately described person named in the will and is capable of taking the bequest, and that there is in point of fact no question arising as to whom the testatrix intended to designate as her legatee. Any different conclusion would be to assume that the testatrix did not mean what she wrote and to impart into the codicil an intention which is not only foreign to its entire scope and particular purpose but which even does violence to its plain reading, and this too for the purpose, not of upholding, but of defeating the legacy.

> This is not construing but destroying the will. Indeed, so definite is the person of the legatee and so perspicuous and unmistakable the gift that the case is hardly one which requires the court to construe the instrument, in the ordinary meaning of the phrase.
>
> The error of the learned judge at the trial seems to be that the intended beneficiary was one which must have a legal residence in the city of New York; but in cases of mere misdescription of residence alone the legacies do not fail where the person intended is definite and certain (LeFevre vs. LeFevre, 59 N.Y. 434; St. Luke's Home vs Association, 52 N.Y. 191. To this extent the judgment should be reversed and the judgment modified so as to permit the appellant to take its share of the estate." [18]

We consider this case directly in point. The gift or bequest in this case is made to the "Red Cross." The only Red Cross capable of accepting the bequest is the American National Red Cross, a national organization having local branches in every state and in every hamlet of any size in the United States. It is generally known simply as the "Red Cross" and very few people know it by its true name. As stated by Judge Macomber, "Its identity is as distinctly established as that of either of the counsel in this case." Like the American Colonization Society, it has always been known as a

national organization with headquarters in the City of Washington and auxiliaries or local societies throughout the nation. Like the American Colonization Society all monies collected by its auxiliaries or branches are forwarded to the parent organization, the American National Red Cross, at Washington, and disbursed by that corporation through its local or auxiliary societies or branches throughout the states of the Union. Like it, again, the state and local organizations of the American National Red Cross are but the hand or agent by which the parent society conducts its work, and the real beneficiary (the American National Red Cross) is as accurately described by calling it the "Red Cross," if not in fact infinitely better described, than it would have been had it been described by its legal designation.

It is hardly to be expected that the ordinary individual, particularly one of the limited elucation of Gustaf Lanart, would be as careful in describing his beneficiary as was Charles Carroll in describing himself when he signed the Declaration of Independence, and identifying himself as "Charles Carroll of Carrollton."

In point also is the case of State of South [19] Dakota appellant vs American National Red Cross, reported in 245 N.W. at p. 399, decided November 28, 1932.

In that case the testator, Theodore Engles made his last will and testament containing the following provision:

"Fourth. The balance of my property, both real and personal, I give and bequeath to Red Cross Society."

It is contended by the American National Red Cross that the real estate passes to it under the fourth paragraph or residuary part of said will. The State of South Dakota contends that said real estate passes to it (the State) for want of legal heirs. Five propositions were presented for consideration in the trial court, among which were:

"Three. Is the language designating the residuary devisee, to-wit, Red Cross Society, sufficiently definite to identify the American National Red Cross?

Four. Can the American National Red Cross receive bequests and devises under its charter?

Fifth. Can the American National Red Cross receive bequests and devises by way of charitable use or trusts?"

In addition to the American National Red Cross of Washington D. C. filing its petition in intervention, the Wakonda branch of the Clay County Chapter of the American National Red Cross claimed that it was entitled to all of the residue under the quoted provisions of said will.

The Circuit Court found in favor of the intervenors, the American National Red Cross of Washington, D. C. to the effect that it was entitled to the property in controversy, and from that decision appeal was taken.

Warren, J. in delivering the opinion of the court, states: [20]

"Appellant urges the failure of the testator to specifically name and identify the beneficiary in the residuary clause, in that he used the term 'Red Cross Society;' that the designation is so uncertain that it may mean the American National Red Cross of Washington D. C. or it may mean the local chapter of the Red Cross, of which he was a member, and that it is therefore most likely that he wished to bestow the gift upon the local organization. Appellant further urges that the language is insufficient to pass the land to the Red Cross Society, in that the testator used only the words 'give and bequeath' and failed to use *use* the usual term 'devise.' An investigation of authorities as to what particular society testator had in mind seems to indicate that the words 'Red Cross Society' mean the national organization. See American National Red Cross vs. Felzner-Post 1928, 86 Indiana Appeals 709, 159 N.E. 771. The belief is strengthened by the wording of the congressional act or charter creating the American National Red Cross (36 USCA. Sec. 1 et seq.),

36 USCA. Sec. 4 of said act of Congress being as follows:

'It shall be unlawful for any person * * * * * to use within the territory of the United States of America and its exterior possessions the

emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words 'Red Cross' or 'Geneva Cross' or any combination of these words.'

It would therefore seem that there is some presumption at least when one speaks of the 'Red Cross' or of the 'Red Cross Society' that the speaker, when not limiting and specifically pointing out the fact that he has in mind a different organization such as the local chapter, he means the American National Red Cross. If it were the wish of the testator to bestow upon the Wakonda branch of the Clay County Chapter of the Red Cross it is quite natural that he would have used approximate language to refer directly by name to some suitable way of designating the local chapter or organization. We feel that the learned trial court was fully justified under the evidence in so finding, and that we are not warranted in disturbing the findings and conclusions as to the intention of the testator."

It has also been held by the appellate court of Indiana in American National Red Cross vs Felzner-Post Inc. 159 N.E. 771, under Burns Ann. St. 1926 Sec. 244 U.S. Statutes [21] are part of law governing state, and appellate court takes judicial notice of them.

"The Courts take judicial notice that American National Red Cross is a corporation by

Act of Congress January 5, 1905 (36 USCA. Sec. 1 et seq.); and of its activities; that it has authority to accept bequests for certain purposes, that it is required to organize subordinate agencies, and that county chapters thereof are its local agents, through which it acts and for which it is responsible."

"Courts also take judicial notice of regulations of governmental and quasi governmental agencies and of provisions and charters of private corporations discharging public charitable functions."

The Territorial Court of Alaska also takes judicial notice of these matters under the law.

Note: It appears that the attorney for the American National Red Cross has used the name "American National Red Cross Society" in prosecuting the proceedings herein on behalf of the American National Red Cross. This I am advised was done through inadvertence or mistake, and permission is hereby given to amend the proceedings herein by substituting the name of "American National Red Cross" wherever "American National Red Cross Society" is used.

The Court therefore holds that the document in question is the holographic will of Gustaf Lanart, deceased; that the testator was of sound mind, over twenty-one years of age and not acting under any fraud, duress or undue influence; that said will was and is entitled to probate as such; and that

by its terms the testator has willed to the American National Red Cross his entire estate.

Findings and Decree may be prepared accordingly.

Done in open court this 15th day of July, 1939.

GEO. F. ALEXANDER
Judge.

[Endorsed]: Filed July 15, 1939. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT.

This cause coming on regularly to be heard upon the 15th day of July, 1939, upon the appeal of American National Red Cross from the decision of the United States Commissioner, ex-officio Probate Judge, dated February 9, 1938, such decision being entitled "Order setting aside purported will admitted to Probate and Decree Admitting the Claims of Erik Einar Krister Lofskog and Swanhild Sally Wilhelmina Abrahamson as sole heirs therein, "appellant being represented by its attorney Frank H. Foster; appellees being represented by their attorneys Faulkner & Banfield and Grover C. Winn; and the court having heretofore heard the testimony adduced by the parties, the argument of counsel for the respective parties and having read the briefs submitted by them and being fully informed in the premises, finds the following facts:

1. That Gustav Lanart died *as* Gambier Bay, Admiralty Island First Division, Territory of Alaska, on or about the 10th day of December, 1936, leaving personal property of the value of approximately $8,000 in cash and stocks in Juneau Precinct and within the jurisdiction of this court.

2. That among the effects of deceased, a document in writing was found in words and figures as follows:

"After Death

Please forward all to Red Cross, as I dont think any relatives are alive, the might be able able to do some good with the little I have

Gambier Bay,
Oct 22, 1932
GUS LANART. [23]

Eagles aerie No. 1, Seattle, will take care of the burial.

What is not mentioned in this will belong to PAF Bellingham the are the owners."

3. That the instrument set forth was written wholly in the handwriting of deceased.

4. That at the time of the making of said instrument Gustav Lanart was of legal age and of sound mind.

5. That Gustav Lanart died leaving no wife or lineal *decendants*.

6. That American National Red Cross is a corporation duly chartered under Act of Congress,

for charitable purposes, and is authorized to receive bequests.

7. That by the term "Red Cross" as used in said instrument testator meant to designate American National Red Cross.

8. That the intent of deceased in making the instrument set forth herein, was to bequeath all his property to American National Red Cross.

9. That said instrument is a valid holographic will and has not been revoked or altered by codicil or otherwise.

From the foregoing facts, the court makes the following

CONCLUSIONS OF LAW:

1. That the Honorable Probate Court of Juneau Precinct, First Division, Territory of Alaska, erred in making its order entitled "Order setting aside purported Will admitted to Probate and Decree admitting the claims of Erik Einar Kristen Lofskog and Swanhild Sally Wilhelmina Abrahamson as sole heirs therein"

2. That American National Red Cross is entitled to a decree to the effect that it is the sole devisee under the will of [24] Gustav Lanart and directing that the Honorable Probate Court of Juneau Precinct, First Division of Alaska proceed to the settlement of this estate in accord with this opinion.

3. That the instrument offered in evidence and set forth in paragraph ..... of the above findings,

is a valid holographic will under the laws of the Territory of Alaska.

Dated at Juneau, Alaska the 24 day of July, 1939.

GEO. F. ALEXANDER
District Judge.

[Endorsed]: Filed July 24, 1939. [25]

In the District Court of the Territory of Alaska, First Division, at Juneau.

No. 4182-A

In the Matter of the estate

of

GUSTAV LANART, deceased.

DECREE.

The above entitled cause coming on regularly to be heard upon the 15th day of July, 1939 upon the appeal of American National Red Cross from a decision of the United States Commissioner, ex-officio Probate Judge in and for Juneau Precinct, First Division of Alaska, dated the 9th day of February 1938, such decision being entitled "Order setting aside purported Will admitted to Probate and Decree Admitting the Claims of Erik Einar Krister Lofskog and Swanhild Sally Wilhelmina Abrahamson as sole heirs therein" Appellants being represented by its attorney Frank H. Foster and appel-

lees being represented by their attorneys Faulkner & Banfield and Grover C. Winn and the court having heard the testimony adduced by the parties and the argument of counsel and having made and entered herein its Findings of Fact and Conclusions of Law: It is now

Ordered, Adjudged and Decreed: That the order of Feb. 9, 1938, above named, be and the same is set aside and declared as naught: That American National Red Cross is hereby declared to be the sole devisee and entitled to inherit all of the estate of Gustav Lanart, deceased: That the holographic will of Gustav Lanart dated Oct. 22, 1932, is a valid will and entitled to probate as such; That the proceedings heretofore had in the court of the United States Commissioner, ex-officio Probate Court for Juneau Precinct, First Division, Territory of Alaska, admitting the will of Gustav Lanart, be reinstated [26] and that further proceedings be had therein not in conflict with this decree.

Dated at Juneau, Alaska, July 24, 1939.

GEO. F. ALEXANDER,
District Judge.

Entered Court Journal No. 12, page 486.

[Endorsed]: Filed July 24, 1939. [27]

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT, CONCLUSIONS AND DECREE ENTERED, AND TO REFUSAL OF COURT TO ENTER CLAIMANT'S PROPOSED FINDINGS AND CONCLUSIONS AND DECREE.

Come now Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson nee Lovskog, claimants of the property of the estate of Gustaf Lanart, deceased, and file this their exceptions to the Findings of Fact, Conclusions of law and Decree entered herein:

I.

Claimants except to Finding No. 2 upon the ground that it is not supported by the evidence.

II.

Except to Finding No. 7 upon the ground that the same is not supported by the evidence and is contrary to law.

III.

Except to Finding No. 8 upon the ground that said finding is contrary to law and to the evidence in this case.

IV.

Except to Finding No. 9 as contrary to law and the evidence.

V.

Except to Conclusion of Law Nos. 1, 2, and 3 upon the ground that they are contrary to law and not supported by the evidence. [28]

VI.

Except to the Decree upon the ground that it is contrary to law and not supported by the evidence.

VII.

Except to the court's refusal to sign and enter the claimant's proposed findings of fact, conclusions of law, decree and order.

Dated at Juneau, Alaska, July 22nd, 1939.

FAULKNER & BANFIELD
GROVER C. WINN
Attorneys for Claimants above named.

Exceptions allowed this 24 day of July, 1939.

GEO. F. ALEXANDER
Judge.

Entered Court Journal No. 12 page 487

[Endorsed]: Filed July 24, 1939. [29]

[Title of District Court and Cause.]

PETITION FOR APPEAL.

Come now Erik Enar Krister Lovskog and Svanhild Sally Wilhelmina Abrahamsson, appellees herein, and feeling themselves aggrieved by the decision, judgment and decree by this court made, signed and entered in this court and cause on July 24, 1939, wherein the court held that that certain document in writing, which reads as follows:

"After Death

Please forward all to Red Cross, as I dont think any relatives are alive, the might be able to do some good with the little I have

Gambier Bay,
Oct. 22, 1932
GUS LANART.

Eagles Aerie No. 1 Seattle will take care of the burial.

What is not mentioned in this will belong to PAF Bellingham the are the owners."

and which is set forth in the Findings, is the last will and testament of Gustav Lanart, deceased; that it is a valid *olographic* will and entitled to be admitted to probate in the Probate Court for the Territory of Alaska, Division Number One, at Juneau, and in which said judgment and decree the court set aside the order of the Probate Court for the Juneau Precinct, Territory of Alaska, dated February 9, 1938, denying admission to probate of such document, do hereby appeal from such final judgment and decree, and the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Error filed herewith; and pray that such appeal be allowed; and further pray that the court herein fix the amount of the [30] cost bond to be given by appellants on appeal; and further pray that upon the filing of such bond, all further proceedings be stayed herein pending such

appeal, and that a time be fixed by the court for the preparation and settlement of the bill of exceptions in this cause.

ERIK ENAR KRISTER LOVSKOG
By H. L. FAULKNER
His Attorney
SVANHILD SALLY WILHELMINA ABRAHAMSSON
By GROVER C. WINN
Her Attorney

Copy received this 29 day of July, 1939.
FRANK H. FOSTER
Attorney for Appellant.

[Endorsed]: Filed July 29, 1939. [31]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL.

In consideration of the petition of appellees herein for allowance of appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, and the court being fully advised in the premises;

It is hereby ordered that the said petition for appeal be, and the same is hereby allowed, and that transcript of the record in said cause, duly authenticated, may be prepared and forwarded, pursuant to law and the rules of the court, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit at San Francisco, California, by the clerk of this court; and,

It is further ordered that the cost bond on behalf of the appellees is hereby fixed in the sum of $500.00, conditioned that the appellees will answer for all damages and costs if they fail to make their plea good, and that such bond be given with two approved sureties, to be approved by either the judge of the above entitled court or the clerk thereof; and that upon the giving of said bond and approval of same, further proceedings be stayed herein;

It is further ordered that appellees shall have until September 2nd, 1939, within which to prepare, file and settle Bill of Exceptions herein.

Dates and signed in open court in Juneau, Alaska, this 29th day of July, 1939.

GEO. F. ALEXANDER

Copy received, July 29, 1939.

FRANK H. FOSTER

Attorney for Appellant.

Entered in Court Journal No. 12 page 499

[Endorsed]: Filed July 29, 1939. [32]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR.

Come now Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson by their attorneys Faulkner & Banfield and Grover C. Winn,

and make and file the following Assignments of Error upon which they will rely in prosecuting their appeal in the above entitled action to the Circuit Court of Appeals for the Ninth Circuit:

I.

The court erred in making and entering Finding of Fact No. 7, which reads as follows: "That by the term "Red Cross" as is used in said instrument, testator meant to designate American National Red Cross", to which Finding appellees excepted and had an exception allowed; for the reason that such Finding No. 7 is contrary to the law and not supported by any evidence.

II.

The court erred in making and entering Finding of Fact No. 8, which is as follows: "That the intent of deceased in making the instrument set forth herein, was to bequeath all his property to American National Red Cross," to which Finding appellees excepted and had an exception allowed; for the reason that the same is not supported by any evidence and is contrary to law.

III.

The court erred in making and entering Finding of Fact No. 9, which reads as follows: "That said instrument is a valid olographic will and has not been revoked or altered by [33] codicil or otherwise," to which Finding appellees excepted and had

as exception allowed; for the reason that the same is not supported by any evidence and is contrary to law.

IV.

The court erred in making and entering its Conclusion of Law No. 1, which reads as follows: "That the Honorable Probate Court of Juneau Precinct, First Division, Territory of Alaska, erred in making its order entitled 'Order setting aside purported Will admitted to Probate and Decree admitting the claims of Erik Einar Kristen Lofskog and Swanhild Sally Wilhelmina Abrahamson as sole heirs therein," to which Conclusion appellees excepted and had an exception allowed; for the reason that the same is contrary to law and not supported by any evidence.

V.

The court erred in making and entering its Conclusion of Law No. 2, which reads as follows: "That American National Red Cross is entitled to a decree to the effect that it is the sole devisee under the will of Gustav Lanart and directing that the Honorable Probate Court of Juneau Precinct, First Division of Alaska proceed to the settlement of this estate in accord with this opinion," to which Conclusion appellees excepted and had an exception allowed; for the reason that the same is contrary to law and not supported by any evidence.

VI.

The court erred in making and entering its Conclusion of Law No. 3, which reads as follows: "That

the instrument offered in evidence and set forth in paragraph ..... of the above findings, is a valid holographic will under the laws of the Territory of Alaska," to which Conclusion appellees excepted and had an exception allowed; for the reason that the same is contrary to law and not supported by any evidence. [34]

VII.

The court erred in making, signing and entering its decree herein dated July 24, 1939, setting aside the order of the Probate Court for the Juneau Precinct, Alaska, entered February 9, 1938, which had in turn set aside an order previously entered in such Probate Court admitting a certain paper memorandum to probate as the will of Gustav Lanart, deceased, and in which order of February 9, 1938, the Probate Court had decreed the brother and sister of deceased, Erik Enar Krister Lovskog and Svanhild Sally Wilhelmina Abrahamsson, to be the sole heirs of Gustav Lanart, deceased, and held that the alleged and purported holographic will of Gustav Lanart was not entitled to probate.

VIII.

The court erred in making and signing that part of its decree herein, dated July 24, 1939, ordering and adjudging that the American National Red Cross is the sole devisee and entitled to inherit all the estate of said Gustav Lanart, deceased, and that the alleged and purported holographic will is a valid will and entitled to probate as such, and

ordering the Probate Court for the Juneau Precinct to admit it to probate.

IX.

The court erred in refusing to make, sign and enter Finding of Fact No. II requested by appellees, which reads as follows: "That in October 1936 the said Gustaf Lanart brought from Gambier Bay, where he lived, to Juneau, Alaska, to the B. M. Behrends Bank and left with the bank for safekeeping, without any directions as to its ultimate disposal in case of his death, a package containing some stocks and bonds, seaman's discharge papers, two bank books, naturalization certificate and certain receipts." [35]

X.

The court erred in refusing to make, sign and enter Finding of Fact No. III requested by appellees, which reads as follows: "That some time in December 1936, after the death of Gustaf Lanart at Gambier Bay, Alaska, certain papers were found at Gambier Bay which had formerly belonged to him and which consisted of bills, folders, radio advertisements and other unimportant and valueless papers, and, among them, some pages of a small notebook, all of which papers and said pages of the notebook had apparently been floating in the water and had been wet and dried out. That the pages of the notebook were not complete, and some of them were missing, and they were loose, and that

on some of the pages of said notebook were found lists of personal property, and on one of the pages there was written, in the handwriting of deceased, as follows:

'After Death

Please forward all to Red Cross, (as i don't think any relatives are alive,) the might be able to do some good with the ..... i have

Gambier Bay
Oct 22, 1932
GUS LANART

Eagles aerie No. 1 Seattle will take care the burial

What is not mentioned in this will belong to PAF Bellingham the are the owners' "

XI.

The court erred in refusing to make, sign and enter Finding of Fact No. IV requested by appellees, which reads as follows: "That deceased, before the date of his death and at the time the writing hereinabove last referred to was written, was a watchman at an old cannery at Gambier Bay belonging to the Pacific American Fisheries company, and often referred to as the "PAF". [36]

XII.

The court erred in refusing to make, sign and enter Finding of Fact No. V requested by appellees which reads as follows: "That deceased was at the

time of his death unmarried, and left surviving him as his sole heirs-at-law and distributees, his brother Erik Enar Krister Lovskog, and his sister Svanhild Sally Vilhelmina Abrahamsson nee Lovskog."

XIII.

The court erred in refusing to make, sign and enter Finding of Fact No. VI requested by appellees which reads as follows: "That said writing in the loose pages of the notebook aforesaid did not constitute a last will and testament of deceased, and the same is not entitled to probate".

XIV.

The court erred in refusing to make, sign and enter the Conclusion of Law proposed by appellees which reads as follows: "That the writing in the notebook which has been offered as the last will and testament of deceased is not entitled to probate and the order of the Probate Court of the Juneau Precinct, Territory of Alaska, of February 9, 1938, is a valid order and should remain in full force and effect and appellant's appeal should be dismissed.

XV.

The court erred in refusing to make, sign and enter the Decree and Order proposed by claimants-appellees to the effect that the document set forth in Assignment No. X is not a valid holographic will and not entitled to probate. [37]

Dated at Juneau, Alaska, July 29th, 1939.

FAULKNER & BANFIELD
H. L. FAULKNER
GROVER C. WINN
Attorneys for Appellees.

Service admitted July 29, 1939.

FRANK H. FOSTER
Attorney for American National Red Cross.

[Endorsed]: Filed July 29, 1939. [38]

[Title of District Court and Cause.]

CITATION.

The President of the United States of America,

To American National Red Cross, appellant herein, and to Frank Foster, its attorney of record:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal entered in the office of the clerk for the District Court of the Territory of Alaska, Division No. 1, at Juneau, wherein American National Red Cross is appellant and Erik Enar Krister Lovskog and Svanhild Sally Wilhelmina Abrahamsson are appellees; and to show cause, if any there be, why the judgment mentioned in said appeal should

not be corrected and speedy justice be done to the parties in that behalf.

Witness the Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and the seal of the District Court, Territory of Alaska, Division No. 1, this 29th day of July, 1939.

GEO. F. ALEXANDER
District Judge

Attest:

ROBT. E. COUGHLIN
Clerk of the District Court, Territory of Alaska, Division No. 1

Service of the foregoing Citation admitted this 29 day of July, 1939.

FRANK H. FOSTER
Attorney for Appellant American National Red Cross

Entered in Court Journal No. 12 Page 499

[Endorsed]: Filed July 29, 1939. [39]

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know all men by these presents, that we, Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson, as principals, and Anna Winn and Charles Waynor, as sureties, are held and firmly bound unto the American National Red

Cross in the sum of Five Hundred Dollars ($500.-00), to be paid to it and for which payment well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators and successors, jointly and firmly by these presents.

Sealed with our seals and dated this 29th day of July, 1939.

The condition of the above obligation is such that whereas the above bounden principals as appellants seek to prosecute their appeal in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Findings and Decree made by the above entitled court on July 24th, 1939, to which reference is hereby made;

Now, therefore, if the above named appellants shall prosecute their appeal to effect and shall answer for and pay all costs and damages that may be awarded against them, if they fail to make their plea good, then this obligation shall be void, otherwise to remain in full force and effect. [40]

ERIK ENAR KRISTER LOVSKOG
By H. L. FAULKNER
His Attorney
SVANHILD SALLY VILHELMINA ABRAHAMSSON
By GROVER C. WINN
Her Attorney
(Principals)
ANNA WINN
CHARLES WAYNOR
(Sureties)

United States of America,
Territory of Alaska.—ss.

We, the undersigned, Anna Winn and Charles Waynor, whose names are subscribed to the foregoing bond as sureties thereon, being first severally duly sworn, each for himself and not one for the other, depose and say: That we are residents of the Territory of Alaska, over the age of twenty-one years, and not in any manner interested in the foregoing action or the outcome thereof, that neither of us is an attorney, counselor at law nor officer of any court; and that we are each worth the sum of $500.00 over and above all our just debts and liabilities, exclusive of property exempt from execution.

ANNA WINN
CHARLES WAYNOR

Subscribed and sworn to before me this 29th day of July, 1939.

[Notary Seal] N. C. BANFIELD
Notary Public for Alaska.

My commission expires Aug. 6, 1942. [41]

ORDER

Now, on this day, it is hereby ordered, that the foregoing cost bond on appeal be, and the same is hereby approved as to amount and sufficiency of sureties; and

It is further ordered that all further proceedings shall be stayed herein pending the appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 29th day of July, 1939.

GEO. F. ALEXANDER

Judge.

Entered Court Journal No. 12, page 500.

[Endorsed]: Filed July 29, 1939. [42]

[Title of District Court and Cause.]

STIPULATION RE PRINTING TRANSCRIPT OF RECORD

It is stipulated between counsel for the respective parties hereinabove named that in printing the record in this cause for use in the Circuit Court of Appeals for the Ninth Circuit, all captions should be omitted after the title of the cause has been once printed, and the words "caption" and "title" and the name of the paper or document should be substituted therefor. All other parts of the record should be printed.

Dated at Juneau, Alaska, this 5th day of August, 1939.

H. L. FAULKNER
N. C. BANFIELD
Attorneys for Erik Enar Krister Lovskog.
GROVER C. WINN
Attorney for Svanhild Sally Vilhelmina Abrahamsson.
FRANK H. FOSTER
Attorney for American National Red Cross.

[Endorsed]: Filed Aug. 5, 1939. [43]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It is hereby stipulated and agreed by and between Faulkner & Banfield and Grover C. Winn, attorneys for appellants hereinabove named, and Frank H. Foster, attorney for appellee, American National Red Cross, that since it is necessary for the Circuit Court of Appeals to examine the original exhibits Nos. 1, 3, and 4 in order to determine the questions of law arising upon the appeal herein, that the originals of the same, as introduced in the trial court, be transmitted by the Clerk of the Court to the Circuit Court of Appeals for the Ninth Circuit for examination by the court; and that Exhibit

No. 2, consisting of a number of checks, need not be transmitted nor become a part of the record for the reason that such exhibit is not pertinent to any assignment of error.

Dated at Juneau, Alaska, August 5th, 1939.

H. L. FAULKNER
N. C. BANFIELD
GROVER C. WINN
Attorneys for Appellants.
FRANK H. FOSTER
Attorney for Appellee.

[Endorsed]: Filed Aug. 5, 1939. [44]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered, that on May 31, 1938, this matter came on regularly for trial and hearing before the court without a jury, the Hon. Geo. F. Alexander, Judge, presiding, and all parties being represented by counsel, whereupon the following proceedings were had:

Appellant's Witness,

GUY McNAUGHTON,

being first duly sworn, testified:

Direct Examination

My name is Guy McNaughton. I am vice-president of the B. M. Behrends Bank. I knew Gus

(Testimony of Guy McNaughton.)

Lanart in his lifetime, and he had an account at our bank. I know the signature and handwriting of Gus Lanart, and the signature and handwriting on the purported will or memo handed me is the signature and handwriting of Gus Lanart. There is no question in my mind that this memo and purported will is in the handwriting of Gus Lanart.

(Whereupon said purported will or memorandum was admitted in evidence, together with some leaves of a notebook, and marked "Exhibit 1", and reads as follows:

APPELLANT'S EXHIBIT 1

"After Death

Please forward all to Red Cross, (as i don't think [45] any relatives are alive,) the might be able to do some good with the.....i have

Gambier Bay
Oct 22 1932
GUS LANART

Eagles aerie No 1 Seattle will take care the burial

What is not mentioned in this will belong to PAF Bellingham the are the owners")

I knew Gus Lanart for eight or ten years. I knew him in 1932 at the time the purported will was dated. I saw him just once in awhile when he came to the bank; I don't know how often. He was of sound mind, with no peculiarities.

(Testimony of Guy McNaughton.)

Cross Examination

I could not say how often I saw him. He came to the bank occasionally. He was mostly employed at canneries as a watchman, and he did not come in often, but when he came in, he would usually come to the bank. I don't know whether I saw him in 1932 or 1934.

(Thereupon, without objection, there was introduced

APPELLANT'S EXHIBIT 3,

which is a letter from J. Edgar Hoover and which reads as follows:

"John Edgar Hoover
Director
Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

April 7, 1938.

Mr. H. J. Hughes,
American National Red Cross Society,
Washington, D. C.

Dear Mr. Hughes:

Reference is made to your visit to this Bureau on March 15, 1938, at which time you submitted for examination a document purported to be the will of one Gustav Lenart, together with several [46] items of correspondence relating thereto.

(Testimony of Guy McNaughton.)

In accordance with your request, the purported will has been examined and the examiner reports that in his opinion the text of the will reads as follows: 'Please forward all to Red Cross (as I don't think any relatives are alive) the *migth* be able to do some good with the little I have.' As of possible interest there is transmitted herewith a photograph which shows this partially obliterated writing somewhat more clearly than does the original document.

The purported will submitted for examination, together with the related correspondence, is being returned to your office by special messenger today, photographic copies of the will having been retained for the completion of this Bureau's file.

Assuring you of my desire to be of assistance, I am

Sincerely yours,
JOHN EDGAR HOOVER
Director''

Enclosure

(Thereupon, there was introduced, without objection,

APPELLANT'S EXHIBIT 4,

which is a violet-ray copy of the memorandum or purported will contained in Exhibit No. 1.)

(Testimony of Guy McNaughton.)

(Thereupon, appellant recalled witness

GUY McNAUGHTON,

who testified as follows:

Direct Examination

At the time Gus Lanart died, he looked like a man of 65 years of age. So far as I know he was of sound mind in 1932. I never knew anything to the contrary.

Appellant Rests.

APPELLEES' CASE IN CHIEF:

GUY McNAUGHTON,

recalled as witness on behalf of appellees further testified as follows: [47]

Direct Examination

I am administrator of the estate of Gus Lanart, appointed by the Probate Court for the Juneau Precinct, and have been administrator ever since probate proceedings were commenced. I am vice-president and cashier of the B. M. Behrends Bank. Gus Lanart came to the bank in October 1936. He died in December 1936. In October 1936 he brought some papers to the bank, consisting of some stocks, two bonds, two bank books, various receipts and naturalization papers. When he first brought them in, they were not contained in anything, but were open, and he handed them to Mr. Morrison in that

(Testimony of Guy McNaughton.)

manner. Mr. Morrison told him he would not accept them that way, but to have them wrapped up and we would keep them. The box remained in the bank. After he died and I was appointed administrator, I went to Gambier Bay where he had lived. Judge Felix Gray, Probate Judge, and Mr. Monagle, attorney, went with me. We went aboard the wanigan where he lived. That was a complete wreck, submerged at high tide. We got in the boat and went up to a fox farmer's house there—I can't remember the name. They had a little bundle of papers given them by Mr. and Mrs. Matthews—a little package. Among the papers were clippings and one thing and another and this memorandum book. The woman who had these things claimed to have received them from Mr. or Mrs. Matthews. They were all stuck together and wet and showed evidence of having been submerged. They looked like they had been in the water. The memorandum book in which the alleged will is contained was the only thing of any value or use. The memorandum book is in the same condition now except that it has been dried out. It was wet then. When it was found, there was just some loose pages. We found them and opened them up. The staple was put in afterward. It wasn't there when we found it. In that memorandum book is a list of guns and various things. He lived [48] on a wanigan, a house built on a scow. This wanigan was in bad condition. The bow was tied at one end on the beach, and it

(Testimony of Guy McNaughton.)

was sloping down, and when the tide came in, it would wash clear inside. Everything was awash and a shambles inside.

Lanart for a number of years was supposed to be a watchman at the cannery there of the Pacific American Fisheries, otherwise known as the PAF. The pages of the little memorandum book were all wet and stuck together and have been dried out since. The book I refer to as the memorandum book is the one with the purported will in it. It is a little pocket memo book of some kind.

JOHN MORRISON, JR.,

called as a witness on behalf of the appellee, being duly sworn, testified as follows:

Direct Examination

I live in Juneau, Alaska, and have lived here since 1923, and work at the B. M. Behrends Bank, having been there since 1926. I am the bank teller. I knew Gus Lanart in October 1936 when he came to the bank and transacted some usual business. At that time he gave me a bundle of papers he wanted me to keep safely. They looked like they were more or less valuable, and I would not accept them. He went out and got one of those little metal boxes, locked it up and brought them to the bank. It was sealed and locked, and we kept it in the bank until he died. In the box were stocks, bonds, cer-

(Testimony of John Morrison, Jr.)
tificates of more or less value. I was not present when it was opened. It was sealed and locked, and I gave him a receipt for a sealed package. He told me he was leaving it there for safekeeping. He didn't tell me to give it to anyone nor how to dispose of it, but just to keep it for him. We didn't open it or do anything with it until after he died.

[49]

Cross Examination

I knew who Gus Lanart was, he had been to the bank at different times, but I couldn't say how far back I was personally acquainted with him. He spent most of his time out of town. He behaved as a sane person, and there wasn't anything wrong with him, to my knowledge. I would say he was along in the sixties, from my observation.

M. E. MONAGLE,

called as a witness on behalf of appellee, being duly sworn, testified as follows:

Direct Examination

My name is M. E. Monagle. I am an attorney and a member of the bar of this court. I have been practicing since January 1930. Mr. R. E. Robertson and myself are attorneys for Guy McNaughton, administrator for the estate of Gus Lanart, who died December 10, 1936.

(Testimony of M. E. Monagle.)

Shortly after he died, Mr. Gray, the Probate Judge, Mr. McNaughton and myself made a trip to Gambier Bay, where Lanart had died. Before going there, we went over Lanart's assets in Juneau. They were in a little safety box—a little tin box eight or ten inches long, three or four inches wide and about three inches high. They were in the bank, this box was, locked up and sealed.

The box contained some stocks, diversified trustees' shares, Packard Motor stock certificates, two other stock certificates, two bank books, quite a number of receipts, and citizenship papers. The box was opened before we went to Gambier Bay. When we went to Gambier Bay, we found nothing of any value, just the wanigan. At Gambier Bay some papers were given us in Mrs. Campbell's house. Mrs. Campbell was there and Mrs. Matthews. [50] Mrs. Matthews was the one who gave it to Judge Gray in a house on a fox island where the Campbells were living. We don't know anything about where these things were found, except from what they told us about it. There was a little handful of papers—I would say forty or fifty papers, most of them bills, advertisements and radio folders, etc. There was nothing of any value. The judge and Mr. McNaughton and I went through them and there was nothing of any value at all. This memorandum book was the only thing that looked like it might be of importance. It was all watersoaked and still wet when we got it. The

(Testimony of M. E. Monagle.)

pages were stuck together. The pages were loose. The staple which is now through them was put there by Judge Gray afterward so none of the pages would be lost. There was no back on the book at the time.

ROBERT E. COUGHLIN,

called as a witness on behalf of the appellee, being first duly sworn, testified as follows:

Direct Examination

My name is Robert E. Coughlin, and I am Clerk of the United States District Court, Territory of Alaska, First Division, and have charge of naturalization records. I have the naturalization record of Gus Lanart, who was naturalized December 16, 1918. The record shows that his original name was Gustaf Lanart Lofskog, and the record shows that at the time he was naturalized his name was changed to Gustaf Lanart.

Whereupon, the court, having taken the case under advisement and having on July 15, 1939, rendered its memorandum decision herein; and on July 22d, 1939, the following proposed [51] Findings of Fact, Conclusions of Law and Decree were presented to the court by appellees, which were refused by the court:

"[Title of District Court and Cause.]

CLAIMANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard on May 31, 1938, before the court upon the appeal from the Probate Court at Juneau, Alaska, taken by the American National Red Cross from the order of the said Probate Court, dated February 9, 1938, denying admission to probate of a certain document alleged to be the last will and testament of Gustaf Lanart, deceased; and Frank H. Foster appearing for appellant, American National Red Cross, and Faulkner and Banfield and Grover C. Winn, appearing as attorneys for Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson nee Lovskog, brother and sister of deceased, Gustaf Lanart, and claimants to his estate; and evidence having been adduced before the court on behalf of both parties and arguments having been later made on behalf of all parties hereto, and the court being fully advised in the premises, does find the following facts:

FINDINGS OF FACT

I.

That Gustaf Lanart died at Gambier Bay, First Judicial Division, Territory of Alaska, on or about December 10, 1936, leaving per-

sonal property within the Juneau Precinct and within the jurisdiction of this court.

II.

That in October 1936 the said Gustaf Lanart brought from Gambier Bay, where he lived, to Juneau, Alaska, to the B. M. Behrends Bank and left with the bank for safekeeping, without any directions as to its ultimate disposal in case of his death, a package containing some stocks and bonds, seaman's discharge papers, two bank books, naturalization certificate and certain receipts.

III.

That some time in December 1936, after the death of Gustaf Lanart at Gambier Bay, Alaska, certain papers were found at Gambier Bay which had formerly belonged to him and which consisted of bills, folders, radio advertisements and other unimportant and [52] valueless papers, and, among them, some pages of a small notebook, all of which papers and said pages of the notebook had apparently been floating in the water and had been wet and dried out. That the pages of the notebook were not complete, and some of them were missing, and they were loose, and that on some of the pages of said notebook were found lists of personal property, and on one of the pages there was written, in the handwriting of deceased, the following:

'After Death
Please forward all to Red Cross, (as i don't think any relatives are alive,) the might be able to do some good with the..... i have

Gambier Bay
Oct 22 1932
GUS LANART

Eagles aerie No 1 Seattle
will take care the burial

What is not mentioned in this will belong to PAF Bellingham the are the owners'

IV.

That deceased, before the date of his death and at the time the writing hereinabove last referred to was written, was a watchman at an old cannery at Gambier Bay belonging to the Pacific American Fisheries Company, and often referred to as the "P.A.F."

V.

That deceased was at the time of his death unmarried, and left surviving him as his sole heirs-at-law and distributees, his brother Erik Enar Krister Lovskog, and his sister Svanhild Sally Vilhelmina Abrahamsson nee Lovskog.

VI.

That said writing in the loose pages of the notebook aforesaid did not constitute a last will

and testament of deceased, and the same is not entitled to probate.

From the foregoing facts, the court makes the following

CONCLUSION OF LAW

That the writing in the notebook which has been offered as the last will and testament of deceased is not entitled to probate and the order of the Probate Court of the Juneau Precinct, Territory of Alaska, of February 9, 1938, is a valid order and should remain in full force and effect and appellant's appeal should be dismissed; and,

It is ordered that judgment be entered accordingly.

Dated at Juneau, Alaska, this.....day of....., 1939.

.....

Judge" [53]

"[Title of District Court and Cause.]

DECREE AND ORDER PROPOSED BY CLAIMANTS

The above entitled cause having come on regularly to be heard on May 31st, 1938, upon the appeal of the American National Red Cross from an order of the Probate Court for the Juneau Precinct, First Judicial Division,

Territory of Alaska, dated February 9th, 1938, and entitled 'Order setting aside purported Will admitted to Probate and Decree Admitting the Claims of Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson as sole heirs', and the appellant American National Red Cross being represented by its attorney, Frank H. Foster, and appellees and claimants above named being represented by Faulkner & Banfield and Grover C. Winn; and testimony having been adduced in open court by all parties hereto, and counsel having later argued the questions of law involved herein; and the court being fully advised in the premises, and having made and filed herein its Findings of Fact and Conclusions of Law;

It is now ordered, adjudged and decreed that the order of the Probate Court, Juneau Precinct, Territory of Alaska, above referred to and which was made and entered on February 9th, 1938, is a valid order, and the purported will of the above named Gustaf Lanart is not entitled to be admitted to probate, and the appeal of the American National Red Cross is hereby dismissed and the cause is remanded to the Probate Court for the Territory of Alaska, Division Number One, for such further proceedings as are necessary to complete the administration of the estate of deceased and distribute the same according to law.

Done in open court this.....day of....., 1939.

.....

Judge." [54]

[Title of District Court and Cause.]

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions was filed on August ....., 1939, within the time allowed for the filing thereof by the orders and rules of this court, and I, the undersigned, District Judge for the First Judicial Division of the Territory of Alaska, who presided at the trial and hearing of the above entitled cause do hereby certify that the foregoing Bill of Exceptions contains all the material facts, matters, things, proceedings, objections and rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, including all evidence adduced at the trial, material to the issues presented by the Assignments of Error herein; and I further certify that the exhibit set forth, referred to and included therein, to-wit, Appellant's Exhibit No. 3, set out in full in the clerk's transcript of record, and Appellant's Exhibits Nos. 1 and 4 constitute all the exhibits offered in evidence at said trial except Exhibit No. 2, which is not pertinent to the issue made by the Assignments of Error; and I hereby make all of

said exhibits a part of the foregoing bill of exceptions and direct that the clerk forward to the Circuit Court of Appeals for the Ninth Circuit, for its examination and inspection, the originals of Appellant's Exhibits Nos. 1 and 4; and I hereby settle and [55] allow the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in this cause and order the same filed as part of the records herein, and the clerk of this court is hereby directed to transmit such Bill of Exceptions with said original Exhibits Nos. 1 and 4 above specifically enumerated, to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the foregoing Bill of Exceptions complies with all the rules of this court relating to the extension of the term for the purpose of presenting, settling and filing the Bill of Exceptions and all orders made by me extending the time for such presentation, settling and filing; and that the foregoing Bill of Exceptions was presented and is hereby settled and allowed within the time prescribed for that purpose and at the same term of court at which the judgment in said cause was rendered and entered.

Done in open court this 5th day of August, 1939.

GEO. F. ALEXANDER,
Judge.

O. K.
FRANK H. FOSTER,
Atty. for Red Cross.

[Endorsed]: Filed Aug. 5, 1939. [56]

[Title of District Court and Cause.]

APPELLANT'S POINTS

In the above entitled cause on appeal the following is a statement of the points and parts of the record, for consideration thereof, upon which appellants intend to rely on their appeal:

Point I

The court erred in holding that the writing or memorandum containing in the memorandum notebook, Exhibit No. 1, is a valid holographic will, and that the same constitutes the last will and testament of Gustaf Lanart, as set forth in Findings of Fact Nos. I and IX.

Point II

The court erred in finding that by the term "Red Cross" as used in the memorandum or alleged purported will, the said Gustaf Lanart meant to designate the American National Red Cross, as set forth in Finding of Fact No. VII.

Point III

The court erred in making and entering Finding of Fact No. VIII, which is to the effect that the intent of deceased in making the instrument or memorandum was to bequeath all his property to the American National Red Cross. [57]

Point IV

The court erred in its Conclusions of Law No. I in which it was held that the Probate Court for the

Juneau Precinct was in error in setting aside the purported will and refusing it probate.

Point V

The court erred in its Conclusions of Law to the effect that the American National Red Cross is entitled to a decree to the effect that it is the sole devisee under the will of Gustaf Lanart and that the instrument offered in evidence and set forth in Findings is a valid holographic will, as found in Conclusions of Law Nos. II and III and in the Decree herein, and that the court should have signed the proposed Findings and Conclusions and Decree tendered by the heirs, appellants herein.

In other words, the points relied upon by appellants are, first, that the instrument or memorandum found in the notebook, introduced in evidence as Exhibit No. 1 is not a valid holographic will and, second, that even if the same were a will in other respects, no beneficiary is designated, and claimant American National Red Cross is not entitled to be found to be the beneficiary.

The testimony is brief, and we think it should all be printed in order to inform the court upon the points relied upon and which are all set forth in the Assignments of Error herein. The decision of the District Court is being forwarded with the appeal papers, but we do not think is necessary to incur the cost of printing this, and, therefore, suggest that it be not printed. [58]

Dated at Juneau, Alaska, this 5th day of August, 1939.

H. L. FAULKNER
N. C. BANFIELD
GROVER C. WINN
Attorneys for Appellants.

Service accepted this 5th day of August, 1939.
FRANK H. FOSTER
Attorney for Appellee.

[Endorsed]: Filed Aug. 5, 1939. [59]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court for the Territory of Alaska, Division Number One:

You will please prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit, in connection with the appeal herein, copies of the following named papers and documents:

1. Order of Probate Court, Territory of Alaska, Division Number One, Juneau Precinct, dated February 9, 1938, entitled "Order setting aside purported will admitted to probate, and decree admitting the claims of Erik Enar Krister Lovskog, and Svanhild Sally Vilhelmina Abrahamsson, as sole heirs."

1(a) Notice of appeal.

2. Decision of District Court herein.

3. Findings of Fact and Conclusions of Law.
4. Decree.
5. Exceptions to Findings, Conclusions and Decree and to refusal of court to enter claimant's proposed Findings, Conclusions and Decree.
6. Petition for order allowing appeal. [60]
7. Order allowing appeal.
8. Assignments of Error.
9. Citation.
10. Cost bond on appeal.
11. Stipulation re printing transcript of record.
12. Stipulation re exhibits.
13. Bill of Exceptions and order allowing same
14. Appellants' points.
15. Original Exhibits Nos. 1, 3 and 4.
16. This Praecipe.

Dated at Juneau, Alaska, this 5th day of August, 1939.

H. L. FAULKNER
N. C. BANFIELD
GROVER C. WINN
Attorneys for Appellants.

Service of copy of above Praecipe acknowledged this 5th day of August, 1939.

FRANK H. FOSTER
Attorney for American
National Red Cross, appellee.

[Endorsed]: Filed Aug. 5, 1939. [61]

United States of America,
District of Alaska, Division No. 1—ss.

CERTIFICATE

I, Robert E. Coughlin, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 62 pages of typewritten matter, numbered from 1 to 62, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in cause No. 4182-A, wherein Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamson are the Appellants, and American National Red Cross is the Appellee, as the same appears of record and on file in my office, and that said record is by virtue of a petition for appeal and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this manuscript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Twenty-Nine Dollars ($29.00) has been paid to me by counsel for Appellant.

In witness whereof I have hereunto set my hand and the seal of the above-entitled Court this 9th day of August, 1939.

[Seal] ROBERT E. COUGHLIN,
Clerk.

[Endorsed]: No. 9269. United States Circuit Court of Appeals for the Ninth Circuit. Erik Enar Krister Lovskog and Svanhild Sally Wilhelmina Abrahamsson, Appellants, vs. American National Red Cross, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed August 21, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

NO. 9269

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY VILHELMINA ABRAHAMSSON,

Appellants,

vs.

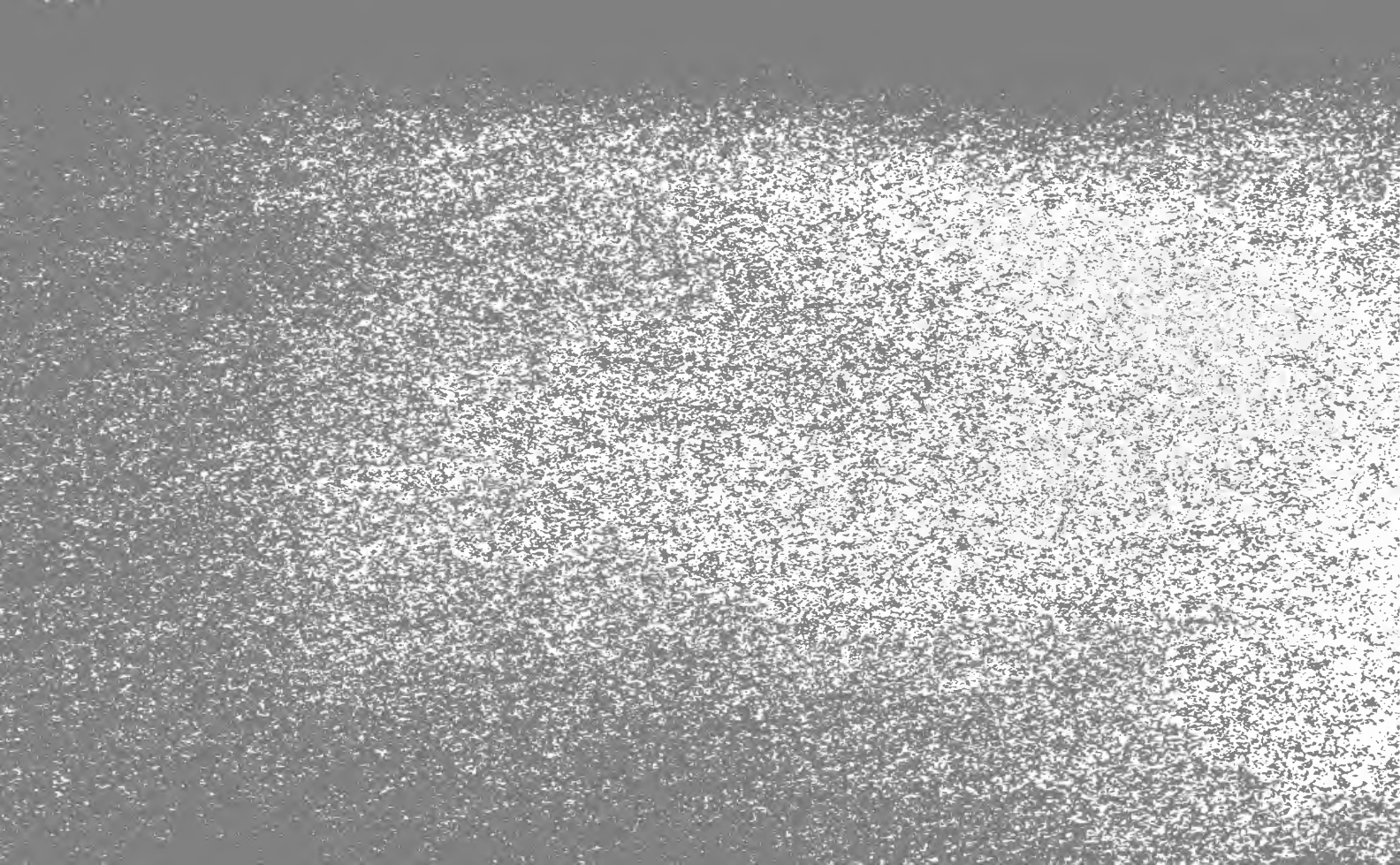
AMERICAN NATIONAL RED CROSS,

Appellee.

Brief for Appellants

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA DIVISION NUMBER ONE

H. L. FAULKNER,
N. C. BANFIELD,
GROVER C. WINN,
Attorneys for Appellants.



SUBJECT INDEX

	Page
Statement of Case	1
The Facts	3
Arguments and Authorities	6
First Point	7
Second Point	27
Conclusion	33

STATUTES CITED

Compiled Laws of Alaska 1933, Sec. 4624	7
Compiled Laws of Alaska 1933, Sec. 3091	36

AUTHORITIES CITED

Brown's Estate, In re., 12 N. E. (2d) 710	14
Blake vs. Hawkins, 98 U. S. 315	20
Cleveland Clinic Foundation vs. Humphrys, 97 Fed. (2d) 849	19
Corpus Juris, Vol. 69, Sec. 1149, p. 97	26
Dahmer vs. Wensler, 94 A.L.R. p. 1	19-20
Dreyer vs. Reisman, 96 N. E. 90	23
Hartman vs. Pendleton, 186 Pac. 572	22
Jones vs. Miller, 119 N. E. 324	18
Jarman on Wills, Vol. 1, p. 645	22-23
Knight vs. Knight, 12 N. E. (2d) 649	14
Karsten vs. Karsten, 254 Ill. 480	21-31
Montague vs. Street, 231 N. W. 728	10-11-12
Maddock vs. Haines, 88 Fed. (2d) 350	18
New Jersey Title G & T Co. vs. Am. Natl. Red Cross, 160 Atl. 843	29-30
Potter vs. Potter, 137 N. E. 425	18
Ruling Case Law, Vol. 28, Sec. 173, p. 211	8
Ruling Case Law, Vol. 28, Sec. 174, p. 214	9
Ruling Case Law, Vol. 28, p. 229, Sec. 190	24
Ruling Case Law, Vol. 28, Sec. 177-8, p. 219	25
Robison vs. Portland Female Asylum, 123 U. S. 702	19
State of So. Dak. vs. Am. Natl. Red Cross, 245 N. W. 399	31
Thompson vs. Randall, 153 S. E. 249	26
Wright vs. Denn, 10 Wheat. 201, 6 Law. Ed. 303	20-21

NO. 9269

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY VILHELMINA ABRAHAMSSON,

Appellants,

vs.

AMERICAN NATIONAL RED CROSS,

Appellee.

Brief for Appellants

STATEMENT OF CASE

The question involved in this appeal is whether a certain writing contained on a page of a small memorandum book is the holographic will of one Gustaf Lanart, referred to also as Gus Lanart. The

memorandum was admitted to probate in the Probate Court for the Juneau Precinct, Alaska, on August 10, 1937, without notice and without hearing. The effect of the admission of the memorandum to probate as a will was to make the American National Red Cross the beneficiary, to the exclusion of the brother and sister of deceased, who are the sole heirs-at-law.

After the memorandum was admitted to probate, the two heirs, namely, Erik, a brother, and Svanhild, a sister appeared and claimed the property of deceased's estate as the sole heirs-at-law. They petitioned the Probate Court to set aside and revoke the order admitting the alleged will to probate and to adjudge them to be deceased's sole heirs-at-law. After a hearing was had and proof submitted, the Probate Court, on February 9, 1938, entered an order revoking the former order of August 10, 1937, admitting the memorandum to probate as the last will of deceased, Gus Lanart. In the last mentioned order, that is, the one of February 9, 1938, the Probate Court held that the document in question did not constitute a will, and the court found the brother and sister to be the sole heirs-at-law. (Tr. pp. 1-3).

From that order of February 9, 1938, the American National Red Cross, claiming the memorandum to be a will, and claiming to be the sole beneficiary thereunder, appealed to the District Court for Alaska at Juneau. The case was heard before the District

Court on May 31, 1938. On July 15, 1939, the District Court rendered an opinion reversing the order of the Probate Court of February 9, 1938, which had held the instrument was not entitled to probate; and on July 24, 1939, the District Court entered Findings and Conclusions and a Decree ordering the instrument in question admitted to probate as the last will and testament of Gus Lanart. (Tr. pp. 31-35). It is from that order of the District Court that this appeal is taken.

No question is raised herein as to the fact that the appellants are the sole surviving heirs-at-law of deceased and entitled to the property of the estate if the document in question is not a will.

THE FACTS

The record is not long, and the facts submitted to the District Court are brief and are set forth in full in narrative form in the Bill of Exceptions. (Tr. pp. 53-62). We summarize them as follows:

Gustaf Lanart for a number of years lived at Gambier Bay, Alaska, where he died on December 10, 1936. (Tr. p. 60). For a number of years he had been a watchman at an old cannery there of the Pacific American Fisheries, otherwise known as the PAF (Tr. p. 59). In October 1936 just two months before his death, he came to the B. M. Behrends Bank in Juneau and left some stocks, bonds, bank books

and other valuable papers in a tin box, sealed and locked, for safekeeping, but left no directions with anyone for its disposal. The bank teller who received it was told it was being left there just for safekeeping (Tr. p. 60). After Lanart's death, the box was opened and found to contain some stock certificates, bank books, bonds, naturalization certificate, receipts, etc. (Tr. p. 61).

After opening the box, the Probate Judge, Mr. Gray, accompanied by Guy McNaughton and M. E. Monagle, went to Gambier Bay, the place where Lanart had lived on an old wannigan (Tr. p. 58). There at the house of a Mrs. Campbell, on a fox island, a certain Mrs. Matthews gave them a handful of papers, mostly bills, advertisements, radio folders, etc., but nothing of any value (Tr. p. 61). Among the papers were some loose pages of a memorandum book (Tr. pp. 58-61; Ex. 1). These papers were all water-soaked, loose and with no back. On one of the pages was written in handwriting of Gus Lanart, the following:

"After Death

"Please forward all to Red Cross, (as i don't think any relatives are alive,) the might be able to do some good with the ..... I have

"Gambier Bay
"Oct 22 1932
"Gus Lanart

"Eagles aerie No. 1 Seattle
will take care the burial

"What is not mentioned
in this will belong to
PAF Bellingham the are
the ownrs"

On some of the other pages of the memorandum book are lists of guns and various things (Tr. p. 58; Ex. 1). Some pages were missing. All the pages found were stuck together and wet and showed evidence of having been submerged (Tr. pp. 61-2). The original memorandum book containing the alleged will has been sent up with the record for the inspection of the court. (Exhibit 1).

Lanart's name was originally Gustaf Lanart Lofskog, and it was changed at the time of his naturalization to Gustaf Lanart (Tr. p. 62).

Appellants admit that at the time of his death, and in October 1932, Lanart was over twenty-one years of age, unmarried, and of sound mind. There was no testimony regarding Lanart's habits, previous place of residence, associates, property rights or former occupations—nothing to show how Mrs. Matthews came into possession of the pages of the memorandum book, nor under what circumstances; nothing was introduced to show any connection between Lanart and the American National Red Cross, nor to throw any light on his motives or intentions at the

time he wrote the memorandum in the little book, nor to show in what manner he eventually disposed of it, so that we have nowhere to look for aid in interpreting the instrument in question save to the language of the writing itself, the remaining pages of the notebook and the circumstances under which it was found and the circumstances of Lanart's visit to the bank in October 1936.

BASIS OF JURISDICTION

The District Court had jurisdiction of this case under the provisions of Section 1091, Compiled Laws of Alaska, 1933, Section 101, Title 28, U. S. C. A., and Sections 4571 to 4574, inclusive, Compiled Laws of Alaska, 1933.

The Circuit Court of Appeals has jurisdiction to review the final judgment in this cause upon appeal, under Section 225, Title 28, U. S. C. A., as amended, and by virtue of Section 4574, Compiled Laws of Alaska 1933.

The amount in controversy is more than $3,000.00.

ARGUMENT AND AUTHORITIES

The Assignments of error are directed to appellants' contention that the trial court's findings and decree holding the instrument in question to be a will, and entitled to probate and ordering it admitted

to probate, are incorrect. The argument in support of this question naturally falls into two parts, the first of which is—Is the instrument sufficient to constitute a holographic will, or any will, under the law, regardless of the identity of the beneficiary?, and, second, if the instrument is otherwise valid as a will, is the alleged beneficiary sufficiently identified to entitle it to receive the proceeds of the estate of deceased?

If the instrument does not comply with the law so as to entitle it to be admitted to probate as a will, then, of course, the designation of the beneficiary is immaterial. If, on the other hand, the language of the will is sufficient to dispose of the estate of deceased after his death, but the beneficiary is not sufficiently identified, then the instrument cannot be said to constitute a will.

If we are correct in either of our contentions, the document in question is not entitled to probate, and the decision of the District Court should be reversed.

FIRST POINT

Is the instrument sufficient to constitute a holographic will, or any will, under the law, regardless of the identity of the beneficiary?

The only statute we have on holographic wills in Alaska is found in Section 4624, Compiled Laws of Alaska 1933, and reads as follows:

> "Holographic wills, with or without attestation, shall be admitted to probate the same as other wills and be proved in the same manner as other private writings."

The first point to be discussed is whether the writing in question constitutes a will. It will be observed that there is one word in the instrument which is badly blurred. Mr. J. Edgar Hoover, in a letter (Ex. 3; Tr. pp. 55-6), says that some unnamed examiner is of the opinion that this blurred or obliterated word is "little." Be that as it may, the memorandum book itself containing the instrument is submitted to this court so that we do not need to rely on testimony, or documentary evidence, but we have the real evidence for this court on that point.

The trial court, in its decision, refers to the rule in interpreting wills that the intent of the testator must be ascertained and given effect. This is the law, and the trial court cited the text of Section 173, Vol. 28, R.C.L., pp. 211-214, as follows:

> "The cardinal rule of testamentary construction is to ascertain the intent of the testator and give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. All rules of construction are designed to ascertain and give effect to the intention of the testator and all rules or presumptions are subordinate to the intent of the testator where that has been ascertained. The intention will control any arbitrary rule, however ancient may be its origin,

> unless the testator attempts to effect that which the law forbids."

The last sentence of the court's quotation does not follow the text exactly, yet it gives the substance of the rule. However, that is only part of the rule, and the remaining part is found in Section 174, commencing at Page 214, Vol. 28, R. C. L., which section reads as follows:

> "It has been long settled that in constructing wills the intention of the testator is to be collected from the words of the will itself, as applied to the subject matter and read in the light of the surrounding circumstances. While as already seen, the purpose of construction, as applied to wills, is unquestionably to arrive at the intention of the testator, that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will."

Even if the trial court had applied all of the rule as hereinabove referred to, we think a mistake was made in its application, for the rule applies to the construction and interpretation of wills, and we take it that before this rule comes into operation, it must first be settled that the document being construed is a will. We think the only application of this rule would be in cases where a testator makes a valid will but some part of it is obscure and ambiguous. The rule would then apply to the interpretation of the will, and the rule would provide that the will must be so

interpretated as to give effect to the intention of the testator as found in the language of the will itself.

We are concerned here with the question of whether the deceased intended this to be a will at all. It is not a question of the construction of a will in the first instance. The first question to be determined is whether such instrument is a will or a mere memorandum, or even a document which Lanart may have thought to be a will.

In the case of *Montague v. Street*, 231 N. W. 728, at page 732, the Supreme Court of North Dakota, in an opinion which treats exhaustively the subject of holographic wills, we find this language:

> "Despite some more or less popular conception, the 'privilege of making testamentary disposition of property is not an inherent or even a constitutional right,' it is wholly statutory, and compliance with statutory requirements 'is absolutely necessary to the validity of any instrument offered as a testament.' *Moody v. Hage*, 36 N. D. 471, 162 N. W. 704, L.R.A. 1918F, 947, Ann. Cas. 1918A, 933; Estate of Carpenter, 172 Cal. 268, 156 P. 464, 465, L.R.A. 1916E, 498; In re Walker's Estate 110 Cal. 390, 42 P. 815, 30 L.R.A. 460, 52 Am. St. Rep. 104; *Alexander v. Johnston et al*, 171 N. C. 468, 88 S. E. 785, says: 'The right to dispose of property by will, being statutory, can be exercised only by following the requirements of the statute.'
>
> "Without a will property would go to the heirs, as determined by statute, and therefore it

> is only by compliance with the statutory requirements that such an heir can be deprived of his inheritance by the act of a testator, confessedly disposing of property to take effect after he has died and the property no longer has a legal owner . . . . "

We contend the instrument in question in this case is not a will for several reasons which will be hereinafter discussed, one of which is that there is no testamentary language used; another is that there was no definite description of property, and the third is that there is no definite beneficiary. The rule is that under such circumstances, in order to cure the defects and clear up the ambiguities, the court could not resort to extrinsic evidence. Much less, then, could the court reach the conclusions arrived at by the trial court in this case upon mere conjecture and speculation, without any evidence; and an examination of the trial court's opinion will show much speculation and conjecture and statements of purported facts wholly outside the record.

Quoting again from the case of *Montague v. Street, supra,* we find this language:

> "But even if executed according to law, the document falls far short of being a will. This document was signed by the decedent. We are to determnie whether it is a will. It will be noted there is nothing in the instrument itself which contains language of testamentary disposition. A 'paper must show a testamentary intent.' 1 Schouler on Wills (6th Ed.) 500. There must

be language contained therein showing the alleged testator gave or bequeathed or devised property. These words need not be used, or, if used, need not be used in their strict legal meaning, but some words must be used to show a testamentary purpose. In such cases as in re Morgan's Estate, 200 Cal. 400, 253 P. 703; In re England Estate, 85 Cal. App. 486, 259 P. 956, and similar cases, we find expressions showing the testator gave certain property or that it is her will, such as 'I, Inez Morgan hereby will,' or 'last will of Anna England' and 'after all expenses are settled the rest to be divided,' etc; or the notation, 'the will of Ellen E. Poland, I made this my will and testament,' as found In re Poland's Estate, 137 La. 219, 68 So. 415; or such terms as 'this 2000 dollars for your own use should I die sudden,' as found in *Fosselman v. Elder*, 98 Pa. 159, construed as a codicil to an existing will. This document simply says: 'Money in bank to be disposed of' and 'Donald Montague $2000.00 and Donald the ranch.' It does not say they are given, it says they are to be disposed of, that is—, some time in the future. The instrument must show the intent of the testator to give. The instrument has all the earmarks of a mere memorandum."

In the case at bar, as in the North Dakota case, there is no language to say that any property is given to anyone, and, as in that case, the instrument in this case "has all the earmarks of a mere memorandum." Let us examine it and the circumstances under which it was found. The pertinent part of the instrument and the part the meaning of which it is necessary to first ascertain in order to determine whether it is

a will would be the words "after death please forward all to Red Cross." The word "forward" is not a testamentary word. The dictionaries say it means "to transmit", "send to the place of destination", but we have not been able to find any authority in support of the contention which could be construed to mean give or bequeath. Then we have the word "all" standing alone, and we have not been able to find any authority to the effect that this could be construed to mean "all my property". Standing alone, then, the instrument does not constitute a will, for it has no testamentary words and no description of the property which is to be forwarded. Therefore, the rule that the intention of the testator must be given effect, if possible, has no application because the document does not indicate that the signer was executing it as a testator. The rule does not apply when the question involved is to ascertain whether it was the intent of a man that a certain instrument should be a will at all. That is something quite different.

However, even if the rule were applicable on the question of determining not what a man intended by certain language in an otherwise valid and certain will, but to determine whether or not an instrument was in fact a will at all, we would encounter considerable difficulty in applying the rule in this case.

As stated, the rule is that the intent to be determined must be gathered from the instrument

itself and not from what the court believed the writer intended to say, and it is fundamental that in determining this point the whole document must be considered.

> "The testator's intention which courts will carry into effect is that expressed by language of will."
>
> "In determining testator's intent, will's language will be interpreted in view of circumstances surrounding testator, but they will not be permitted to import into will an intention different from that expressed by its language, however clearly such different intention may be made to appear."
>
> *Knight v. Knight*, (Sup. Ct. Ill.) 12 N. E. 2d 649. Decided Dec. 1937.
>
> "The intention to be sought in constructing a will is not what by inference may be presumed to have existed in testator's mind but what he has expressed in the will."
>
> *In re Brown's Estate*, (Sup. Ct. Ill.) 12 N. E. 2d 710. Decided Jan. 1938.

In discussing the intention of the writer of this document, we find the following: First, the instrument is found in a little memorandum book, some of the pages of which are missing and the back of it is missing. On other pages of this book are lists of personal property, including a list of guns. Just what was on the page immediately preceding the page containing the instrument in question we do not know.

The writing in question undoubtedly directed that something be forwarded after his death to the Red Cross. Just what the Red Cross was to do with it is not known. Just what was to be forwarded it is difficult to say, but it is safe to assume that what Lanart meant was to forward some list of property contained in the little memorandum book. He intended this in October 1932. Why he subsequently disposed of this memorandum, no one knows. Appellee made no attempt to account for the finding of the memorandum book, nor to account for the fact that it had been apparently thrown away, submerged in the water and later found in the condition described by the witnesses. The court says in its opinion:

> "The will had been found in a small black grip floating in the water." (Tr. p. 16).

There is no testimony about any black grip. And again,

> "He had never been in Canada so far as anyone knows." (Tr. p. 18).

There is no testimony on that point.

At the time of the writing of the instrument, there is nothing to show that Lanart had any other property than that listed in the little book. He did not appear at the bank with the stocks and bonds and bank book, etc., until four years later. He may not have had any of that property at the time he wrote

the instrument, and while, of course, if he made a valid will in 1932, it would cover after-acquired property in 1936, still the circumstances strongly indicate that the subject of the memorandum was something listed in the book and not all of his propetry, including that which was deposited in the bank in October 1936. It is hardly likely that he would come to the bank in 1936 and leave there for safekeeping his bank books, stocks, bonds, naturalization certificate and everything of any value, and then leave a will disposing of this very property floating around in a half-mutilated memorandum book in a wannigan at Gambier Bay, a hundred miles distant.

That he did only intend to have forwarded to the Red Cross a list or lists of property set down in the little memorandum book is further borne out by the language of the instrument in question, which reads: "What is not mentioned in this will belong to PAF, Bellingham. The are the owners." He undoubtedly meant that the things to be forwared to the Red Cross were those things listed in the memorandum book, and that what was not listed in the memorandum book, but was present at Gambier Bay, where he lived, was the property of the PAF. Otherwise, this portion of the instrument makes no sense, for if he was disposing of all of his property by this instrument, as in a will, he would not be excepting any portion as the property of the PAF.

If we construe the instrument as a whole, which we must, then we must conclude that Lanart, after bequeathing all of his property to the Red Cross, declared that the remainder of it belonged to the PAF. This would not make sense.

Then, again, whether the obliterated word is "little" is for the court to determine from an examination of the document, but we submit that a man in Lanart's station in life, acting as a watchman at an old abandoned cannery, would hardly refer to the sum of $8,000.00, which was the total appraised value of his estate, as a "little." If he had that in 1932, he would not consider it "little", but much, and if he had that in 1932 and was making it the subject of a will and bequeathed it all to the Red Cross, it is hardly likely that he would impose upon the Eagles Aerie of Seattle the expense of burial. There is nothing in the testimony anywhere to indicate any motive in making this writing, nothing to indicate that he had any connection with the Eagles Aerie No. 1, and nothing to indicate what he meant by the word "all" except what is found in the memorandum book itself.

It is a fundamental rule that courts cannot make a will for a man nor reconstruct one. In order to give effect to this document as a will, it would necessarily need to be rewritten, and the very least changes that could be made in it would be a reconstruction of the words somewhat as follows: "After death, I give and

devise to the American National Red Cross all my property." This would be, in effect, writing a new instrument.

> "It is unnecessary to cite authorities to the well-established rule that the plain intention of the testator should always guide the court in constructing a will, and that all presumptions and rules of construction must yield to that intention. It must always prevail unless contrary to some rule of law or public policy or established rule of property, and it must be gathered from a consideration of the entire will. *Jones v. Miller*, 283 Ill. 348, 119 N. E. 324; *Potter v. Potter*, 306 Ill. 37, 137 N. E. 425.
>
> "On the other hand, unless the intention of the testator be clear and reasonably certain, it will not be permitted to override the plain meaning of ordinary words, or the fixed legal meaning of technical words. It is not sufficient that the court may entertain a private belief that the testator intended something different from what he actually said, but that intention must be expressed with reasonable certainty on the face of the will. While the testator may disinherit an heir, yet the law will execute that intention only when it is put in a clear and unambiguous shape. *Wright v. Page*, 10 Wheat. 204, 6 L. ed. 303."
>
> *Maddock v. Haines*, 88 Fed. (2d) 350.
>
> "If the intention of a testator is apparent from the language of a will, the court need only follow it. Cases are of little assistance because the language of one will is seldom that of another. The law must be respected, but the golden

rule of interpretation is the intent of the testator which should be made to conform to rules of law which it is presumed the testator knew and considered when drafting his will. The Court should put itself in the position of the testator at the time he made his will and consider all material facts and circumstances known to him with reference to which he used the words in the will and declared his intention. All facts and circumstances respecting persons or property to which a will relates are legitimate and often necessary evidence to enable the meaning and application of the testator's words to be understood."

Cleveland Clinic Foundation v. Humphrys, 97 Fed. (2d) 849.

In the case of *Robinson v. Portland Female Orphan Asylum*, 123 U. S. 702, the Supreme Court of the United States, quoting from a decision of the Supreme Court of Massachusetts, found in 128 Mass. 370, states the rule as follows:

"A decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture . . . . "

In *Dahmer v. Wensler*, 94 A.L.R. 1, it is held that—

"Proof of surrounding circumstances is inadmissable for the purpose of importing into a will an intention which is not there expressed. In construing a will, the testator's intention must

> be gathered from the words of the will itself. The purpose of a testamentary construction is to arrive at the intention of the testator as expressed by the language of the will, and not the intention which existed in his mind apart from such language."

It is clear that courts must find the intention of the testator to be expressed in the document, and cannot resort to conjecture, and as the Supreme Court says in *Blake v. Hawkins*, 98 U. S. 315—

> "The interpreter may place himself in the position occupied by the testator when he made the will and from that standpoint discover what was intended."

If we resort to conjecture, we may be led far afield. The rule that the intention of the alleged testator must be found in the instrument itself may well be illustrated by discussing a case where a man made a valid will, executed in writing with all formality required by law, and duly attested, and in this will he disposed of all his property in a certain manner. Then afterward he changes his mind and tells all of his friends that he does not intend that his property shall go as directed in the instrument, but that he intends to change it and he gives instructions to his attorney to change it, but that he dies before any change is made. Then we would find that his will was one thing and his intention something else.

Again, in the case of *Wright v. Denn*, 6 L. Ed.

303, the Supreme Court of the United States, in construing a will, has this to say:

> "Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did, but the intention cannot be extracted from his words with reasonable certainty; and we have no right to indulge ourselves in mere private conjectures."

The Supreme Court of Illinois, in *Karsten v. Karsten*, 254 Ill. 480, uses the following language, in which reference is made to Vol. 1, *Jarman on Wills*, 4th Ed., 409:

> "Under the statute, that, only, is the will of the testator which is in writing and signed by him, and the statutory provisions would be rendered nugatory and the door opened to all the evils which the law requiring wills to be in writing and attested was designed to prevent, if, when the written statement failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied or its inaccuracies corrected from extrinsic source . . . . "

In the case at bar we do not even have any extrinsic evidence upon which to base a conclusion that what Gus Lanart meant by the word "forward" was actually "give and bequeath", and that what was meant by the word "all" was all property of which he should die possessed, or to determine what he meant

by declaring the remaining property to be that of the PAF. No evidence whatsoever was introduced, and the determination of this was left to mere conjecture and speculation.

In the case of *Hartman v. Pendleton*, 186 Pac. 572, the Supreme Court of Oregon states the following:

> "The remark of Tindal, Ch. J., in Doe ex dem. *Clarke v. Ludlam*, 7 Bing. 279, 131 Eng. Reprint 108, is one of universal application: 'I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it.' "

In *Jarman on Wills*, Vol. 1, P. 645, we find the following:

> "To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a *definite subject and object;* and uncertainty in either of these particulars is fatal.
>
> "A simple example of a devise rendered void by uncertainty as to the intended subject matter of disposition is afforded in the case of *Bowman v. Milbanke,* where the words 'I give all to my mother, all to my mother,' were adjudged insuf-

ficient to carry the testator's land to his mother, as it was *wholly doubtful and uncertain to what the word 'all' referred.*

In *Mohun v. Mohun*, the will considered merely of these words: 'I leave and bequeth to all my grandchildren, and share and share alike * * * It had been contended that the whole difficulty would be removed by the transposition of the word 'all', which in its present position, was without effect, the word 'grandchildren' including all who correspond to that description; but his honor observed that there was uncertainty both in the subject and object of the bequest, and the court could not transpose words for the purpose of giving meaning to instruments which had none.

"To authorize the transposition of words, it is clearly not enough (as shown hereafter) that they are inoperative in their actual position; they must be inconsistent with the context. In the case just cited the word 'all', though silent where the testator has placed it, was not repugnant; and it is observable that the transposition of the word 'all', even if justifiable, would not, according to *Bowman v. Milbanke*, have supplied a definite subject of disposition."

See, also, *Dreyer v. Reisman*, 96 N. E. 90. In that case the alleged will devised and bequeathed "unto my living son and daughter, share and share alike, the same to be equal divided between themselves." The court held this will to be invalid for uncertainty, and held that while the testator undoubtedly intended to divide all of his property between his living son

and daughter, he did not express that intention in the will, and that the court could not supply the words to express the intention.

If the court is to be permitted to resort to conjecture and to reconstruct this instrument as a will and base its reconstruction upon what the court thinks was the intention of the testator, then the heirs-at-law, the brother and sister, would be entitled to have the court take into consideration the fact that the whole thing was predicated upon the assumption that they were not living, and to conclude that if they were alive, the intention of Lanart would have been something entirely different, for he clearly states that what he is doing is done for the reason that he did not think his relatives were living, and the court, of course, would have to take into consideration the well-known rule as laid down in 28 *R.C.L. P.* 229, *Sec.* 190, and which is of universal application, and reads as follows:

> "The heirs of a testator are favored by the policy of the law and cannot be disinherited upon mere conjecture, and when the testator intends to disinherit them, he must indicate that intention clearly, either by express words or by necessary implication . . . . In the absence of plain words in the will to the contrary, the presumption is that the testator intended that his property should go in the legal channel of descent, and if it is uncertain and doubtful whether the testator intended to devise real estate, the title of the heir must prevail. There is no presump-

> tion from the fact that he made a will, that the testator meant its construction to be at all possible points inconsistent with the statute of distribution. *Instead the law favors that construction of a will which conforms most nearly to the general law of inheritance.*" (Italics ours).

If the court can say that from this instrument it was Lanarts intention to give and bequeath all his property to the American National Red Cross, then it also appears that such intention was predicated upon the contingency that no relatives were alive. Wills are permitted only by virtue of the statute. They are creatures of the statute, and, in the absence of a will, a deceased person's property descends to his heirs, and a document cannot be loosely, or what is sometimes termed "liberally", construed when the result would be to disinherit heirs-at-law.

In its decision upon which the trial court based its Findings and Decree in this case, a quotation is given from 28 *R.C.L. Secs.* 177-178, part of which reads as follows, at p. 219:

> " . . . . Accordingly in interpreting wills favor will be accorded to those beneficiaries who appear to be the special objects of the testator's bounty."

This is correct, but there is another and paramount rule of construction to which the rule cited by the lower court is subject, and that rule is as follows:

"Where an ambiguity exists in a will, unless there is a manifest intention to the contrary, a presumption that the testator did not intend to disinherit his heirs at law or next of kin, but intended that his property should go in accordance with the laws of descent and distribution, will be applied as an aid in construing the will; and a testator's heirs at law or next of kin will not be disinherited by mere conjecture, but only by express words in the will or by necessary implication arising therefrom. An intention to disinherit an heir will not be imputed to a testator by implication, nor where he uses language capable of a construction which will not so operate . . . . "

69 C. J. Sec. 1149, p. 97 et seq.

"Where testamentary intention is not clearly shown, the heirs are favored and are entitled to the benefit of the doubt affecting their rights."

Thompson v. Randall, 153 S. E. 249.

If we are going to ascertain Lanart's intention from something outside the will, or from mere conjecture, would it not be reasonable to assume that what he intended in October 1932 was not what he intended in December 1936? We might well find that he changed his intention and threw the alleged will away. The facts bear this out, for it was found submerged in the water, while everything of value which he had had been placed in the bank for safekeeping, without any directions for its disposal.

SECOND POINT

If the instrument is otherwise valid as a will, is the alleged beneficiary sufficiently identified to entitle it to receive the proceeds of the estate of deceased?

In other words, if there is a definite subject, and the court can insert after the word "all" in the document the words "my property" or "the property of which I may die possessed" and ignore altogether the reference to the property of the PAF, then is there a definite object? The testator uses the words "Red Cross" with nothing more, and the court in Finding of Fact Nos. 7 and 8 (Tr. p. 33) finds that the testator meant to designate the American National Red Cross as his beneficiary, and concludes in Conclusion No. 2 (Tr. p. 33) that the American National Red Cross is the sole devisee of Gus Lanart, and adjudges in the Decree that the American National Red Cross is the sole devisee (Tr. p. 35).

The words "Red Cross" do not describe any organization or corporation. It may well be that Lanart meant the American National Red Cross, but the document does not say so, and the court cannot designate the American National Red Cross except upon extrinsic evidence. Of course, it is a well-known rule in the construtcion of wills that extrinsic evidence may be introduced for the purpose of showing just who or what was meant by a beneficiary improperly

named or whose identity is uncertain. For instance, if a man wills his property to John Smith of Douglas, Alaska, and there are two John Smiths, a father and a son, the court could not tell on the face of the instrument what the testator meant, and could not arbitrarily say that the testator meant to give it to the father, and neither could it say that the testator meant to give it to the son. In such cases, resort may be had to extrinsic evidence to show what the testator really intended. The will would be, to all intents and purposes, valid on its face, but it would contain a latent ambiguity. The trial court seems to have missed the distinction between a latent ambiguity and a patent ambiguity. In the illustration given hereinabove, extrinsic evidence could be introduced, for instance, to show that John Smith, the son, had lived with the testator, perhaps attended him during his last illness, rendered him many favors, contributed to his support at times, and that could be taken into consideration by the court in determining which John Smith was meant; but the court could not resort to conjecture to determine this; and evidence would be necessary.

In the case at bar there was no evidence to throw any light upon what Gus Lanart meant by the term "Red Cross". We may presume that he intended the American National Red Cross, but he did not say so, and no evidence was offered on this point.

It is a well-known fact that there are many organizations with the words "Red Cross" in their names—there is the Canadian Red Cross, the Swedish Red Cross, and several others. There is one in England and in other countries. The writer of the instrument was a "Swede". It is just as reasonable to assume that he meant the Swedish Red Cross as that he meant the American National Red Cross. It would have been easy for the proponent of the alleged will, the appellee herein, to have introduced some testimony, if such existed, showing that Lanart had some connection with the American National Red Cross, but we do not find one word. If he had any connection with the American National Red Cross, it would have been an easy thing to prove, for lists of its subscribers must be available. Undoubtedly he would have among his papers somewhere receipts, letters or some indication that he had some connection with the American National Red Cross, if such is the fact.

The words "Red Cross" standing alone do not describe any entity, and we contend there was nothing before the trial court upon which to base a conclusion that what was meant was the American National Red Cross. In such cases as this devises and bequests, if made in a will duly executed, have been upheld by the courts only where there was extrinsic evidence to show what the testator meant by the words. This point is well illustrated in the case of *New Jersey Title Guaranty & Trust Co. v. American National Red*

Cross, 160 Atl. 843. In that case the testator made a will in due form, and, after certain specific bequests, he provided that the residue be given, devised and bequeathed to the New Jersey Chapter of the American Red Cross. There was no New Jersey Chapter of the American Red Cross, but there was a chapter known as the Jersey City Chapter of the American Red Cross, and the court held that the testator meant the Jersey City Chapter of the American Red Cross; but the court did not arbitrarily find that, but found it only after evidence was presented before the court showing that to be the intention of the testator and showing his connection with the Jersey City Chapter of the American Red Cross through a long period of years, and that he had belonged to it for many years, was a frequent contributor and actively interested in its work, but these facts had to be established by evidence. The court could not assume them.

We submit that under the rules of law and all decisions which we have examined, in order for the court to determine that what Lanart meant was the American National Red Cross, and not the Canadian Red Cross, or the English Red Cross, or the Swedish Red Cross, there would need to be some evidence introduced; and we submit that if there is any merit in the contention that the American National Red Cross was meant, it was a fact easily susceptible of proof —at least some proof — and none was offered or attempted.

This contention is further illustrated in the case cited by the lower court on pages 14-16 of the opinion. That is the case of the *State of South Dakota v. American National Red Cross*, 245 N. W. 399. The appellate court, in upholding the trial court in that case, uses this language, as cited by the trial court herein on page 16 of the decision: (Tr. p. 26).

> "We feel that the learned trial court was fully justified *under the evidence in so finding* . . . . " (Italics ours).

Again we find in the South Dakota case, at page 401, the concluding paragraph, which is not cited by the trial court herein, and which is as follows:

> "The findings of fact of the trial court are *in harmony with the evidence* . . . . " (Italics ours).

As we have said hereinabove, there is a distinction between a patent ambiguity and a latent ambiguity apparent on the face of a document. In the case of wills, no evidence of any nature is permitted to be introduced to clear up a patent ambiguity—that is, one appearing on the face of the will. In this case, no evidence could be introduced to show what the testator meant by the word "forward", nor to show what he meant by the word "all". These are patent ambiguities. That is illustrated in the case of *Karsten v. Karsten*, 254 Ill. 480. The will under consideration in that case contained the following lan-

guage: "It is my will that my daughter Mary and my son Charles and my daughter Anne shall be equally divided between all three." The court said that it was undoubtedly the intent of the testator to divide some property between these three children, but since he did not say so, the court could not reconstruct the language, or add words to it, and that it was of no force or effect. It contained a patent ambiguity, or one appearing on the face of the will. On the other hand, a latent ambiguity is one which does not appear on the face of the will, but arises when we seek to put the will into operation, as discussed in the illustration we have given hereinabove. In such cases, evidence may be introduced to clear up the latent ambiguity, but it cannot be cured or removed by the court's speculation or conjecture.

In the illustration which we have given hereinabove of the two John Smiths at Douglas, there would be no ambiguity on the face of the will, for it does not appear that there are two John Smiths, and the ambiguity does not arise until it is sought to carry out the terms of the will. No ambiguity arises in the document under consideration herein until it is sought to carry out its terms, and then if it is construed to be a will, we encounter the fact that there is no such organization as the Red Cross; and to determine that the testator meant an organization having some other name, although similar, proof of that fact must be supplied.

CONCLUSION

In seeking to construe the instrument as a will sufficient to transfer the property of deceased to the American National Red Cross, we find at least four insurmountable objections, each one of which, in turn, has been deemed by the courts sufficient to deny probate to instruments of similar character. First, there are no testamentary words used, and the word "forward" does not mean give or bequeath. The second is the word "all" standing alone cannot be construed to mean all of the deceased's property and that the courts are not permitted to add sufficient words to give it that meaning. The third is that the words "Red Cross" do not describe any entity; and the fourth is that the mention of the fact that the title to all other property is in the PAF makes the instrument puzzling, to say the least, even if otherwise explicit.

In other words, there is the absence of testamentary words, no description of property, the indefinite and ambiguous language employed, the inconsistent statements concerning the title to the remainder of the property, the incomplete designation of any beneficiary, and, lastly, the reference to relatives. For all anyone knows, the decedent might have heard between October 1932 and December 1936 that relatives were alive and he concluded to throw the memorandum in the waters of Gambier Bay. At any rate,

he apparently attached no importance to it in 1936, either for the reason that it had already served its purpose, or that the property listed had been disposed of or that he had changed his mind, and he then threw the memorandum in the Bay.

In many states, the law relating to holographic wills provides that such instruments, to be valid, among other requirements, must be found among the valuable papers of the decedent. We do not have such a statute in Alaska; but the reason for the requirement in many state laws is apparent, and, while our law does not have this provision, still the fact that the valuables of deceased, everything of importance, were all deposited in the bank for safekeeping, with no directions for disposal, while the memorandum under consideration was apparently abandoned, thrown away and discarded, should be a very significant fact to be taken into consideration in determining Lanart's intention; and it seems apparent that what he intended to have done in 1932 was to have some specific articles of personal property, now unascertainable, delivered to the Red Cross, after his death, that apparently between 1932 and 1936 these articles had been disposed of, for the testimony shows that nothing of value was found at Gambier Bay, that whatever was meant by the memorandum might well have been already forwarded to the Red Cross during the life of deceased, and that there was no further use for the memorandum. There are stronger reasons

for assuming this, under all the circumstances, than there are for concluding that the memorandum was intended as a will, disposing of all the property to the American National Red Cross.

Then, again, while we think, in any event, the document is too vague, uncertain and ambiguous to be construed as a will at all, the rule against conjectures, strained construction and the importation of language into the document is much more rigid when there are heirs-at-law whom such construction would disinherit than it would be if no such heirs existed. Furthermore, the document does not say that Lanart is giving anything to the Red Cross. It does not say that anything is to be the property of the Red Cross. It does not say what the Red Cross is to do with it. It does not say which Red Cross.

Let us assume, for the sake of argument, that we should find this instument with the property of Lanart at Gambier Bay, after his death, that the property included all of his valuables, all those which were left in the bank, that there were no contest, that the property considered wholly of things which could be carried in the mails, and a person attempted to follow the directions contained in the instrument and the forwarder should place the package in the post-office, addressed simply to the Red Cross. Where would it go? It would certainly find its way to the nearest local chapter, which would, of course, be the

Juneau Chapter, and it would not be sent to the American National Red Cross at Washington, which is now claiming it, and the result would be wholly different from that which we will have if the trial court's decision is permitted to stand. Or, let us suppose that the finder of the property and the instrument should decide that what Lanart meant by the words "Red Cross" was the American National Red Cross, and not the Juneau Chapter, and he should forward the package to the American National Red Cross. What could the American National Red Cross do with it under the law and in obedience to the only direction contained in the will? The property would then have been "forwarded" to the Red Cross, and the next step would be that the American National Red Cross would have to administer on it, for an estate of a deceased person cannot be transferred merely by delivery. The creditors have a right to subject it to the payment of their claims. The Territory has a right to the payment of the inheritance tax due it under the provisions of Section 3091, Compiled Laws of Aalska 1933. This section provides for the imposition of an inheritance tax, and such tax would be levied under the provisions of Subdivision (1) of Section 3091, Compiled Laws of Alaska 1933, which reads as follows:

> "(1) When the transfer is by will or by intestate laws of this Territory from any person dying possessed of property while a resident of the Territory."

An administrator would have to be appointed, and, then, suppose in the course of administration, the brother and sister appeared and claimed the residue of the estate. Could the American National Red Cross claim it to the exclusion of the heirs? We think not, for their connection with it would have ended. It would have been "forwarded" to them, as directed, and the deceased's command or wish, as expressed in the plain language of the document, would have been fulfilled. Even if the property had been sufficiently described and the words "Red Cross" could be construed to mean the American National Red Cross, and there were no other inconsistencies or ambiguities in the document, we think the most that could be claimed by the American National Red Cross would be the right to administer the property.

We think, therefore, that the Probate Court was right in its order of February 9, 1938, the concluding part of which reads as follows:

> "Now Therefore, it appearing to the Court, that there is some reasonable doubt as to the purported Will, and that the legal claims of the sister and brother as heirs is sufficiently proved and established, in consequence thereof.
>
> "It is hereby adjudged and ordered, that the purported Will as admitted to probate on August 10, 1937, he set aside and the Letters Testamentary with Will Annexed issued on that same date be revoked, and furthermore,

> "It is hereby decreed that Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson, a brother and sister of the deceased, are legally the sole heirs."

and that the District Court was wrong in reversing that order.

Respectfully submitted,

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Attorneys for Appellants.

NO. 9269

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY VILHELMINA ABRAHAMSSON,

Appellants,

vs.

AMERICAN NATIONAL RED CROSS,

Appellee.

REPLY BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE

FRANK H. FOSTER,
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Attorneys for Appellee

SUBJECT INDEX

	Page
Statement of Case	1
Facts	2-3
Foreword	4
First Point	4
Second Point	10-11-12-13
The Heirs	13-14
Conclusion	14

STATUTES CITED

Compiled Laws of Alaska 1933, Sec. 4624	5
Compiled Laws of Alaska 1933, Sec. 4639	10
2 Fed. Ann. pp. 59-64	10

AUTHORITIES CITED

Ruling Case Law Vol. 28 p. 58	4
Ruling Case Law Vol. 28 pp. 161-162	5
Ruling Case Law Vol. 28 p. 225	5
Ruling Case Law Vol. 28 Sec. 172 p. 210	12
Ruling Case Law Vol. 28 p. 165	7
Riley vs. Casey 185 Iowa 461, 170 NW 472	8
In re Shumway's Will, 128 Misc. 429 246 N. Y. S. 178	8
In re Tousey's Will 34 Misc. 363, 69 N. Y. S. 846	9
Harvard Law Review 1928 209-231	10
Estate of Theodore Engles, deceased, State of South Dakota Appellant vs. American National Red Cross, respondent 245 NW 399	10
Chamberlain vs. Owings 30 Maryland 447	6
Clifford vs. Dyer 2 R. I. 99, 57 Am. Dec. 708	9

NO. 9269

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Appellants,

vs.

AMERICAN NATIONAL RED CROSS,

Appellee.

REPLY BRIEF OF APPELLEE

STATEMENT OF CASE

This case arises on appeal from a decision of the United States Commissioner, ex officio Probate Judge of Juneau Precinct, First Division, Territory of Alaska to the District Court of the First Divis-

ion, Territory of Alaska, which decision is set forth on pages 1, 2 and 3 of the Transcript of Record herein, upon which appeal a trial was had in the District Court above named, and a decision was rendered on the 15th day of July, 1939, by the Judge of the District Court, (Transcript of Record, pages 5 to 31 inclusive). Findings of Fact and Conclusions of Law were thereupon promulgated and a Decree was entered on July 24th, 1939. (Pages 31 to 35 inclusive Transcript of Record). By the aforesaid Decree, the Order of the Commissioner was reversed and Appellee herein was decreed to be the sole beneficiary and devisee under the Will of Gus or Gustav Lanart, deceased.

It is from the decision of the Honorable District Court above set forth, that this appeal is taken.

THE FACTS

The facts leading up to this appeal are set forth in the Memorandum of Decision of the Judge of the District Court and it is unnecessary for Appellee to repeat them here, more than to say that by the undisputed evidence there was found among the effects of Gustav Lanart, after his death, a memorandum book (Appellant's Exhibit 1, page 54 Transcript of Record). The text of this exhibit follows:

"After Death

Please forward all to Red Cross, (as i don't

think any relatives are alive,) the might be able to do some good with the ——— i have

Gambier Bay
Oct. 22, 1932
GUS LANART

Eagles aerie No. 1 Seattle will take care the burial

What is not mentioned in this will belong to PAF Bellingham the are the owners")

Exhibit No. 4 is a Violet Ray copy of Exhibit No. 1. Exhibit No. 3 is a letter from John Edgar Hoover, in which he states that the missing word is "little".

The testimony of the witnesses undisputed by Appellant herein, is to the effect:

1. That at the time of the making of the Will above set forth, Lanart was over the age of 21 years.

2. That at the time of the making of the will above set forth, Lanart was of sound mind.

3. That the Will is dated and is wholly in the handwriting of Gustav Lanart.

4. That at the time of his death Lanart was unmarried and had no children, or grandchildren.

FOREWORD

Inasmuch as the Honorable Judge of the District Court of the First Division, Territory of Alaska, has in his Memorandum Decision, (pages 5 to 31 inclusive, Transcript of Record), in an able and comprehensve manner set forth as grounds for his decision, the basis of Law supporting the same, we shall not attempt, except briefly, to answer Appellants' contentions; the Law cited by Appellant is undoubtedly correct in most instances, although inapplicable, in our opinion, to sustain his case. We will, however, endeavor to point out the fallacy of his argument in some respects.

FIRST POINT

The first question raised by Appellant is "Is the instrument sufficient to constitute a holographic will, or any will, under the law, regardless of the identity of the beneficiary?"

> "A will is commonly defined as any instrument executed with the formalities of law, whereby a person makes a dispositon of his property to take effect after his death." (28 RCL p. 58)

Inasmuch as the right to devise one's property by Will is not a natural right, but is wholly statutory, we must be guided by the Statute of the Territory of Alaska in determining whether or no the instrument in question is a will, the only Statute of the Terrtory of Alaska relating to holographic wills,

is found in Section 4624, Compiled Laws of Alaska, 1933, and reads as follows:

> "Holographic wills, with or without attestation, shall be admitted to probate the same as other wills and be proved in the same manner as other private writings."

There is no definition given in the Code and we must look to the General Law:

> "A holographic will, which in a number of jurisdictions is a recognized kind of testamentary instrument, is one entirely written, dated and signed by the testator in his own handwriting. - - - - -
>
> Aside from the requirements as to writing, date, and signature, a holographic will is subject to no other form. - - -
> It is sufficient if the writing expresses, however informally, a testamentary purpose in language sufficiently clear to be understood." (28 RCL Sec. 116, pages 161 and 162).

Appellants quote from Volume 28 RCL p. 211 to 214 in regard to the construction of Wills. All of the authorities are in accord with the rule as here stated. In order to constitute a valid will, the intent to make a will must clearly appear from the contents of the instrument, but in construing the will, it is not necessary to follow the words in the sequence of the will itself. The rule as stated in Section 187, p. 225, Vol. 28, RCL as follows:

> "In the construction of wills, words may be

> transposed, supplied or rejected where warranted by the immediate context or the general scheme of the will."

Appellants argue that the instrument in question is not a will for the reason that no particular property is devised. For the purpose of argument let us change the form of the wording to make more clear the purpose of testator:

> After death please forward all the little i have to Red Cross, (as i don't think any relatives are alive) they might be able to do some good with it.
>
> (Signed) Gus Lanart
> Gambier Bay
> Oct. 22, 1932

The **Animus Testandi** of Lanart is clearly shown from the will. He said "After death," intending thereby to devise his property for a definite purpose upon his decease.

Appellant argues that the word "all" is not sufficient to pass the estate. In Chamberlain vs. Owings 30 Maryland 447, the following appears:

"All I have," when used in a will is sufficient to pass the fee when such intention is manifest from the entire instrument.

It is further contended that "forward" is not sufficient to take the place of "give or bequeath." The rule as stated before with regard to holograph-

ic wills, is that no formality of expression is required but that the intent of testator must prevail. Lanart was an ignorant man, as clearly appears from the spelling of the instrument in question; that he used the word "forward" in the sense of transmit, as defined in Webster's Dictionary is undoubtedly true. The purpose for which his property was to be used after being forwarded or transmitted to Red Cross, was clearly shown by the words "they might be able to do some good with the little I have". It is also argued that the fact that Lanart did not keep his will in a safe deposit box, is proof that he did not intend it to be a will. Counsel for Appellant has evidently been misled by a series of decisions from States whose statutory requirements are to the effect that a holographic will to be valid, must be kept among the valuable papers of deceased. No such requirement exists under the Law of the Territory of Alaska and as is stated in RCL Volume 28, p. 165:

> "The place where a holographic will is put by the Testator, or is found is not generally considered material, but the Statutes of a few States require that such a will must be found among the valuable papers and effects of the deceased."

Appellant raises the question of the effect of the words "as I don't think any relatives are alive," it being suggested that inasmuch as the Testator was mistaken in this assumption, the will should be refused admission to Probate. On this point we submit the following authority:

In Riley vs. Casey, 185 Iowa, 461, 170 NW 472, (1919) the testatrix stated in her will that two of her children were excluded from her will because they had received certain benefits by a conveyance from their grandmother. The two children denied such a conveyance. Evans, Jr., stated:

> "A testator, of sound mind, may make a mistake and may act upon it in the making of his will to the detriment of a proper subject of his bounty, but the mere proof of such mistake will neither invalidate the will nor subject it to reformation."

In re Shumway's Will, 128 Misc. 429, 246 NY Supp. 178, (1930) involved a will which recites that as the testator has already made advances to the contestant during his life time, no further provision would be made by the will. The contestant denied any advances by the testator. The will was admitted to probate. The court stated that it could only effectuate the intention of the testator expressed in the will, and would not undertake to re-write a will in the light of what the testator might have intended had the mistake not been made. Wingate S. at page 184-185 says:

> "In the last analysis, the testator had an absolute right to divert his property from this contestant; he was under no obligation to assign any reason for so doing, and an inaccurate statement of a reason will not be held to invalidate the fee and voluntary testamentary directions of this competent testator."

There is some authority to the effect that a will will be denied probate because of a mistake, only when it appears what would have been the will of the testator but for the mistake. In Clifford vs. Dyer, 2 RI. 99, 57 Am. Dec. 708, the son of the testatrix was omitted from her will. He had been absent for some ten years and the testatrix told the scrivener that she believed him to be dead. The Court held that the will would have been the same had the testatrix known that the son was alive. However, Greene, C. J. Stated:

"But if this were not apparent, and she had made the will under a mistake, as to the supposed death of her son, this could not be shown **dehors** the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix had she not made the mistake."

The above approved in In Re Tousey's Will 34 Misc. 363, 69 NY Supp. 846. In this case the will contained a statement that deceased was unmarried and had no "direct heirs". A cousin who had not seen the testatrix for more than forty years, contested the probate on the ground that the testatrix had mistakenly supposed him to be dead and that as to him, she died intestate. The objection was overruled, and the will was admitted to probate. It was stated that even though the testator was actuated by erroneous opinions on questions of fact, the directions of the testator should be followed.

Also see 41 Harvard Law Review (1928) 209, 231.

Section 4639 CLA 1933, provides:

> "Construction of wills; testator's intention to be carried out. All courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them."

Under the clear provisions of the above Statute and decisions of many courts of competent jurisdiction, holding in accord with the same rule, we submit that the decision of the District Cour, Territory of Alaska, in reversing the order of the Probate Court was correct and should be sustained on the point that the instrument in evidence, Exhibit 1, is a valid will and is entitled to probate as such.

SECOND POINT

As his second point of argument Appellant urges the failure of testator to specifically name and identify the beneficiary under the will, in that he used the term "Red Cross", and that such designation is so uncertain that the American National Red Cross is not entitled to receive the estate of deceased.

The American National Red Cross Society was created under charter of Congress, 36 U. S. C. A. also found in 2 Fed. Ann. pp 59-64, and provides

among other things "To continue and carry on a system of National and International relief in time of peace, to accept bequests for such purposes".

In the case of "In the matter of the Estate of Theodore Engles, deceased. State of South Dakota appellant vs. American National Red Cross, respondent" reported in 245 Northwestern at page 399, the following appears:

> "Appellant urges the failure of testator to specifically name and identify the beneficiary in the residuary clause in that he used the term "Red Cross Society"; that the designation is so uncertain that it may mean the American National Red Cross of Washington ,D. C., or it may mean the local chapter of the Red Cross of which he was a member, and that it is therefore most likely that he wished to bestow the gift upon the local organization. Appellant further urges that the language is insufficient to pass the legal title to the property to the "Red Cross Society" in that he only used the words "give and bequeath" and failed to use the usual term "devise". An investigation of authorities as to what particular society testator had in mind seems to indicate that the word "Red Cross Society" means the National Organization. See American National Red Cross v. Felsner Post (1927) 86 Ind. App. 709, 159 NE 771. This belief is strengthened by the wording of the Congressional Act or charter creating the American National Red Cross 36 U. S. C. A., Paragraph 4 of said Act of Congress being as follows:

"It shall be unlawful for any person * * * to use within the Territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words, 'Red Cross' or 'Geneva Cross' or any combination of these words.

It would therefore seem that there is some presumption at least when one speaks of Red Cross of the Red Cross Society that the speaker when not limiting and specifically pointing the fact that he has in mind a different organization such as a local chapter, that he means the American National Red Cross. If it were the wish of the testator to bestow upon the Wakonda branch of the Clay County chapter of the Red Cross it is quite natural that he would have used appropriate language to refer directly by name or in some suitable way of designating the local chapter or organization. We feel that the learned trial court was fully justified under the evidence in so finding that we are not warranted in disturbing his findings and conclusions as to the intention of the testator."

R. C. L. Volume 28, Section 172, page 210, reads as follows:

"The doctrine early became crystallized as a part of the common law of England that gifts to charitable uses should be highly favored and construed by the most liberal judicial rules rather than that the gift should fail, and the intent of the donor fail of accomplishment. Charitable bequests are therefore

> liberally construed to carry into effect the intention of the testator, and every presumption with the language used will be indulged to sustain them."

In view of the foregoing authorities it would seem clear that the American National Red Cross is the proper appellation of Red Cross as stated in the will of Gustav Lanart, and that the Honorable District Court of the First Division, Territory of Alaska, made no error in so finding.

THE HEIRS

On p. 3 of Brief of Appellants, the following appears:

> "No question is raised herein as to the fact that the appellants are the sole surviving heirs-at-law of deceased and entitled to the property of the estate if the document in question is not a will."

In the order of the United States Commissioner ex officio Probate Judge, which was reversed by the District Court of the First Division, Territory of Alaska, from which last named decision this appeal is being taken, the following appears, (Transcript of Record p. 3):

> "It is hereby decreed that Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson, a brother and sister of the deceased, are legally the sole heirs."

An examination of the record of the case appealed from herein, will fail to disclose any exhibits, testimony or offers of testimony showing any connection or relationship between Appellants herein and Gus or Gustav Lanart, deceased.

In the absence of proof of heirship in the District Court we are at a loss to understand how this appeal could be maintained in any event.

CONCLUSION

Under the law and the facts as heretofore stated, we believe that the decision of the Honorable District Court of the First Division, Territory of Alaska should be affirmed.

Respectfully submitted,

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No. 9270

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, and GEORGE GIOVANOLA, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees.

Transcript of Record

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Adjudication and Order of Reference 16

Answer of J. H. McCune, et al., to Petition in Intervention 65

Answer of Petitioning Creditors to Petition of J. H. McClune, et al. 70

Appeal from Order Allowing Intervention:

- Assignment of Errors on 88
- Citation on 4
- Designation of Record on (Circuit Court of Appeals) 140
- Designation of Record on (District Court) 94
- Notice of 85
- Order allowing 81
- Order Consolidating Appeals 131
- Petition for 87
- Statement of Points on (Circuit Court of Appeals) 137
- Statement of Points on (District Court) 90

Index

Page

Appeal from order denying petition to vacate adjudication:

Assignment of errors on 81

Citation on 2

Designation of record on (Circuit Court of Appeals) 135

Designation of record on (District Court) 92

Notice of 78

Order allowing 81

Order Consolidating Appeals 131

Petition for 80

Statement of Points on (Circuit Court of Appeals) 131

Statement of Points on (District Court) 83

Assignment of Errors on Appeal from Order Allowing Intervention 88

Assignment of Errors on Appeal from Order Denying Petition to Vacate Adjudication 81

Citation on Appeal from Order Allowing Intervention 4

Citation on Appeal from Order Denying Petition to Vacate Adjudication 2

Clerk's Certificate 96

Decision, Memorandum of 75

Designation of Record on Appeal from Order Allowing Intervention 94

Index Page

Designation of Record on Appeal from Order Allowing Intervention (Circuit Court of Appeals) 140

Designation of Record on Appeal from Order Denying Petition to Vacate Adjudication..... 92

Designation of Record on Appeal from Order Denying Petition to Vacate Adjudication (Circuit Court of Appeals)..... 135

Involuntary Petition for Adjudication of Bankruptcy 5

Motion of Trustee to Dismiss Petition of J. H. McClune, et al..... 61

Names and Addresses of Attorneys..... 1

Notice of Appeal from Order Allowing Intervention 85

Notice of Appeal from Order Denying Petition to Vacate Adjudication..... 78

Order Allowing Appeal from Order Allowing Intervention 88

Order Allowing Appeal from Order Denying Petition to Vacate Adjudication..... 81

Order Allowing Intervention of Creditors..... 77

Order Consolidating Appeals..... 131

Order Denying Petition to Vacate Adjudication 76

Petition for Appeal from Order Allowing Intervention 87

Index

Page

Petition for Appeal from Order Denying Petition to Vacate Adjudication 80

Petition, Involuntary, for Adjudication of Bankruptcy 5

Petition of J. H. McCune, et al., to Vacate Adjudication 17

Petition of Thomas J. Smitheram, et al., in Intervention 44

Exhibits to Petition of Intervening Creditors:

A—Proof of Unsecured Debt, Squier and Goux 49

B—Proof of Unsecured Debt, Smitheram 58

Memorandum of Points and Authorities in Support of Petition 60

Reporter's Transcript of Proceedings 97

Statement of Points on Appeal from Order Allowing Intervention (Circuit Court of Appeals) 137

Statement of Points on Appeal from Order Allowing Intervention (District Court) 90

Statement of Points on Appeal from Order Denying Petition to Vacate Adjudication (Circuit Court of Appeals) 131

Statement of Points on Appeal from Order Denying Petition to Vacate Adjudication (District Court) 83

Index Page

Stipulation for Consolidation of Record on Appeal 129

Substitution of Attorneys 142

Testimony 97

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 31965-C

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA BARBARA, a corporation,

Bankrupt.

CITATION

United States of America—ss.
The President of the United States

To First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson, Catherine Davidson, and George Giovanola, Trustee in Bankruptcy, Greeting:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, on the 5th day of September, 1939, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the Southern District of California, Central Division, wherein you are appellees and J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, are the appellants, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

Witness, the Honorable Wm. P. James, United States Judge for the Southern District of California, Central Division [2] on the 26 day of July, 1939.

WM. P. JAMES
Judge of the above entitled Court. Signing in lieu of Judge Cosgrave who is absent from the District.

Receipt of a copy of the above "Citation" is hereby admitted this 31st day of July, 1939.

JOHN WILLIAM HEANEY
FRANCIS PRICE
A. C. POSTEL and
HAROLD PARMA
By WARNER EDMONDS, JR.
Attorneys for First National Trust & Savings Bank, Horace P. Hoefer, Peter Davidson and Catherine Davidson.

W. P. BUTCHER
Attorney for George Giovalona, Trustee in Bankruptcy.

[Endorsed]: Filed Aug. 2, 1939. [3]

[Title of District Court and Cause.]

CITATION

United States of America—ss.
The President of the United States

To Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Greeting:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, on the 5th day of September, 1939, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the Southern District of California, Central Division, wherein you are appellees and J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, are the appellants, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

Witness, the Honorable Wm. P. James, United States Judge for the Southern District of California, Central Division, on the 26 day of July, 1939.

WM. P. JAMES
Judge of the above entitled Court.
Signing for Judge Cosgrave
who is absent from the District.

[5]

Received a copy of the within "Citation" this 31st day of July, 1939.

W. P. BUTCHER
By S. T. T.
STANLEY T. TOMLINSON
Attorneys for Thos. J. Smitheram, E. W. Squier, and J. F. Goux.

[Endorsed]: Filed Aug. 2, 1939. [6]

[Title of District Court and Cause.]

PETITION

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division:

The petition of First National Trust and Savings Bank of Santa Barbara, of Santa Barbara, California, Horace P. Hoefer, of Santa Barbara, California, and Peter Davidson and Catherine Davidson, husband and wife, of Santa Barbara, California, respectfully shows:

That Mortgage Securities Inc. of Santa Barbara, of the City of Santa Barbara, State of California, in said District, has for the six months next preceding the date of the filing of this petition had its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California, in said District; that the said Mortgage Securities Inc. of Santa Barbara is a corporation organized under the law of the State of California and that it is a monied and business corporation and

not a municipal, railroad, insurance or banking corporation, or building and loan association; that the said Mortgage Securities Inc. of Santa Barbara owes debts to the amount of $1,000.00 and over and at all times mentioned herein was and is now insolvent; that your petitioners are creditors of said Mortgage Securities Inc. of Santa Barbara, having provable claims against it which amount in the aggregate, in excess of the value of securities held by them, to $500.00. [8]

That your petitioner, First National Trust and Savings Bank of Santa Barbara, is the owner and holder of five (5) promissory notes of said Mortgage Securities Inc. of Santa Barbara as follows:

1. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated May 29, 1931, payable to First National Trust and Savings Bank of Santa Barbara or Order on August 27, 1931, in the sum of $10,000.00, with interest at the rate of 7% per annum.

2. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated June 4, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on September 2, 1931, in the sum of $10,000.00, with interest at the rate of 7% per annum.

3. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated June 16, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on September 14, 1931, in the sum of $10,000.00, with interest at the rate of 7% per annum.

4. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated June 29, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on September 26, 1931, in the sum of $15,000.00, with interest at the rate of 7% per annum.

5. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated August 10, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on November 8, 1931, in the sum of $5,000.00, with interest at the rate of 7% per annum.

That an action was commenced in the Superior Court of the State of California, in and for the County of Santa Barbara, on July 9, 1935, to recover the amount due on said notes; that said action is still pending and said notes have not been paid.

That your petitioners, Horace P. Hoefer, Peter Davidson and Catherine Davidson, are and each of them is a creditor of Mortgage Securities Inc. of Santa Barbara by reason of the following facts:

That at all times mentioned herein and prior to 1931 each of said petitioners was a stockholder of Mortgage Securities Inc. of Santa Barbara and as such stockholders were liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the [9] proportion that the stock held by each bore to the whole of the subscribed capital stock of said Mortgage Securities Inc. of Santa Barbara; that

prior to the 15th day of October, 1936, certain creditors of Mortgage Securities Inc. of Santa Barbara made demand upon said petitioners, Horace P. Hoefer, Peter Davidson and Catherine Davidson for payment of each of said petitioner's indebtedness to said creditors by reason of such stockholders' liability; that on October 15, 1936, your petitioner, Horace P. Hoefer, paid to said creditors the sum of $296.00 in satisfaction of his indebtedness to said creditors and by reason of such payment your petitioner, Horace P. Hoefer, has a provable claim against said Mortgage Securities Inc. of Santa Barbara in the sum of $296.00, together with interest thereon from October 15, 1936; that said sum of $296.00 has not been paid; that on the 15th day of December, 1936, your petitioners, Peter Davidson and Catherine Davidson, paid to said creditors the sum of $555.00 in satisfaction of their indebtedness to said creditors and by reason of such payment your petitioners, Peter Davidson and Catherine Davidson, have a provable claim against said Mortgage Securities Inc. of Santa Barbara in the sum of $555.00, together with interest thereon from December 15, 1936; that said sum of $555.00 has not been paid.

That your petitioners hold no security for the payment of said claims.

That within four months next preceding the filing of this petition, the said Mortgage Securities Inc. of Santa Barbara, while insolvent, committed

an act of bankruptcy in that it suffered and permitted a creditor to obtain through legal proceedings a preference by way of attachment and did not vacate or discharge the same within thirty days from the date of such attachment; that said preference arises by reason of the following facts: [10]

That an action is now pending in the Superior Court of the State of California, in and for the County of Santa Barbara, entitled "G. Virginia Kaysser, Plaintiff, vs. Mortgage Securities Inc. of Santa Barbara, a corporation, Defendant", being Action No. 26699; that said action was instituted by the plaintiff therein to recover on promissory notes of said Mortgage Securities Inc. of Santa Barbara; that on the 7th day of January, 1938, J. H. McCune filed a complaint in intervention in said action alleging that he was the owner and holder of a claim against said Mortgage Securities Inc. of Santa Barbara in the sum of $8,437.50; that said claim arose by reason of stockholders' liability payments theretofore made by Fred T. Jackson and Alice P. Jackson, stockholders of said Mortgage Securities Inc. of Santa Barbara; that said complaint in intervention further alleged that the said J. H. McCune is the assignee of any and all claims of said Fred T. Jackson and Alice P. Jackson against said Mortgage Securities Inc. of Santa Barbara by reason of said stockholders' liability payments; that said J. H. McCune did on January 7, 1938, cause two writs of attachment to be issued out of

said Superior Court in said action, one addressed to the Sheriff of the County of Ventura, and one addressed to the Sheriff of the County of Santa Barbara; that pursuant to said writ of attachment, the Sheriff of Ventura County levied upon all right, title and interest of said Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in said Ventura County and standing of record in the name of Security Title Insurance and Guarantee Company, of Santa Barbara, California, and that said Sheriff did on January 12, 1938, record a copy of said writ and a notice of attachment in the Office of the County Recorder of Ventura County and on said day posted a copy of said writ and a notice of [11] attachment on each of said parcels of real property; that pursuant to said writ of attachment the Sheriff of Santa Barbara County did on the 10th day of January, 1938, levy upon all right, title and interest of Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in the County of Santa Barbara, and did on said day record a copy of said writ and a notice of attachment in the office of the County Recorder of Santa Barbara County and posted a copy of said writ and a notice of attachment on each of said parcels of real property; that said Sheriff of Santa Barbara County did likewise on the 11th day of January, 1938, levy upon all moneys, credits, goods, effects, debts and

property due from Security Title Insurance and Guarantee Company to said Mortgage Securities Inc. of Santa Barbara by serving on said Security Title Insurance and Guarantee Company on the 11th day of January, 1938, a notice of garnishment.

That an action is now pending in the Superior Court of the State of California, in and for the County of Santa Barbara, entitled "G. Virginia Kaysser, Plaintiff, vs. Mortgage Securities Inc. of Santa Barbara, a corporation, Defendant", being Action No. 27038; that said action was instituted by the plaintiff therein to recover on certain promissory notes of said Mortgage Securities Inc. of Santa Barbara in the total sum of $30,000.00, payable to County National Bank and Trust Company of Santa Barbara; that on the 7th day of January, 1938, J. H. McCune filed a complaint in intervention in said action alleging that he was the owner and holder of a claim in said Mortgage Securities Inc. of Santa Barbara in the sum of $5,062.50; that said claim arose by reason of stockholders' liability payments theretofore made by Fred T. Jackson and Alice P. Jackson, stockholders of said Mortgage Securities Inc. of Santa Barbara; that said complaint in intervention further alleged that the said J. H. McCune is the assignee of any and all claims of said Fred T. Jackson and Alice P. Jackson against [12] said Mortgage Securities Inc. of Santa

Barbara by reason of said stockholders' liability payments; that on January 7, 1938, the said J. H. McCune and the said G. Virginia Kaysser, plaintiff in said action, caused writs of attachment to be issued out of said Superior Court in said action, two addressed to the Sheriff of the County of Ventura and two addressed to the Sheriff of the County of Santa Barbara; that pursuant to said writs of attachment, the Sheriff of Ventura County levied upon all right, title and interest of said Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in said Ventura County and standing of record in the name of Security Title Insurance and Guarantee Company, of Santa Barbara, California, and said Sheriff did on January 12, 1938, record copies of said writs and notices of attachment in the office of the County Recorder of Ventura County and on said day posted copies of said writs and notices af attachment on each of said parcels of real property; that pursuant to said writs, the Sheriff of Santa Barbara County did on the 10th day of January, 1938, levy upon all right, title and interest of Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in the County of Santa Barbara and did on said day record copies of said writs and notices of attachment in the office of the County Recorder of Santa Barbara County and posted copies of said writs and notices of attachment on each of said parcels of real property.

That at the time of the levying of said attachments, as aforesaid, the said Mortgage Securities Inc. of Santa Barbara had an interest in and to the real property so attached and in and to certain moneys, credits, goods, effects, debts and property due from the Security Title Insurance and Guarantee Company. [13]

That the attachments so levied have never been released, determined or vacated or discharged, but that ever since have and do now constitute subsisting liens upon the property of said Mortgage Securities Inc. of Santa Barbara, and that on May 10, 1938, said liens will become a preference not to be released or avoided by bankruptcy proceedings, and that said attached property will become and be finally disposed of and sequestered by said J. H. McCune and G. Virginia Kaysser and that your petitioners and the general creditors of said Mortgage Securities Inc. of Santa Barbara will be deprived of said property and of the value thereof.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon Mortgage Securities Inc. of Santa Barbara, as provided by the bankruptcy laws of the United States of America, and that said Mortgage Securities Inc. of Santa Barbara may be adjudged bankrupt within the purview of such laws.

Dated: This 7th day of May, 1938.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA,
By ROBERT E. LEWIS,
Vice President,
HORACE P. HOEFER,
PETER DAVIDSON,
CATHERINE DAVIDSON,
Petitioners.
JOHN WILLIAM HEANEY,
FRANCIS PRICE,
A. C. POSTEL
HAROLD A. PARMA,
Attorneys for Petitioners.

[14]

State of California,
County of Santa Barbara,
City of Santa Barbara—ss.

Robert E. Lewis, Vice President of the First National Trust and Savings Bank of Santa Barbara, one of the petitioning creditors mentioned in the foregoing petition, and duly authorized to make this oath on behalf of said petitioner, does hereby make solemn oath that the statements of fact contained in the foregoing petition are true.

ROBERT E. LEWIS.

Subscribed and sworn to before me, this 7th day of May, 1938.

[Seal] KATE ORD NELSON.

Notary Public in and for the County of Santa Barbara, State of California.

My Commission Expires February 5, 1941.

State of California,
County of Santa Barbara,
City of Santa Barbara—ss.

Horace P. Hoefer, one of the petitioning creditors mentioned in the foregoing petition, does hereby make solemn oath that the statements of fact contained in the foregoing petition are true.

HORACE P. HOEFER.

Subscribed and sworn to before me this 6th day of May, 1938.

[Seal] MARIAN A. JONES,

Notary Public in and for the County of Santa Barbara, State of California.

State of California,
County of Santa Barbara,
City of Santa Barbara—ss.

Peter Davidson and Catherine Davidson, two of the petitioning creditors mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained in the foregoing petition are true.

PETER DAVIDSON,
CATHERINE DAVIDSON.

Subscribed and sworn to before me, this 7th day of May, 1938.

[Seal] KATE ORD NELSON,

Notary Public in and for the County of Santa Barbara, State of California.

My Commission Expires February 5, 1941.

[Endorsed]: Filed May 9, 1938. [15]

[Title of District Court and Cause.]

ADJUDICATION AND ORDER OF REFERENCE.

At Los Angeles, in the said District, on the 1st day of June, A. D., 1938, before the Honorable Wm. P. James, Judge of said Court in Bankruptcy, the petition of First National Trust and Savings Bank of Santa Barbara; Horace P. Hoefer; and Peter Davidson and Catherine Davidson, husband and wife, that Mortgage Securities, Inc., of Santa Barbara, a corporation, be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Mortgage Securities Inc., of Santa Barbara, a corporation, is hereby declared and adjudged a bankrupt accordingly.

It Is Therefore Ordered, that said matter be referred to Hugh J. Weldon, Esq., one of the Referees in Bankruptcy of the Court, to take such further proceedings therein as are required by said Acts;

and that the said Mortgage Securities Inc. of Santa Barbara, a corporation, shall attend before the said Referee on the 8th day of June, 1938, at Santa Barbara and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said Involuntary Bankruptcy.

Witness the Honorable Wm. P. James, Judge of the said Court, and the seal thereof, at Los Angeles in said District, on the 1st day of June, A. D., 1938.

[Seal of the Court]

R. S. ZIMMERMAN,
Clerk.
By H. K. JACOBS,
Deputy Clerk.

[Endorsed]: Filed June 1, 1938. [16]

[Title of District Court and Cause.]

PETITION FOR ORDER VACATING ADJUDICATION FOR BANKRUPTCY.

Before the Honorable Judge Cosgrave, Judge of the Above Entitled Court:

This verified petition, presented and filed by and on behalf of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, respectfully shows:

I.

Mortgage Securities Inc. of Santa Barbara, the above named bankrupt, is now, and at all times herein mentioned has been, a corporation, organized

and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California.

II.

The County National Bank and Trust Company of Santa Barbara is now, and at all times herein mentioned has been, a national banking association, organized and existing under and by virtue of the laws of the United States of America, with its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California.

III.

On or about the 12th day of March, 1931, in the said City of [17] Santa Barbara, the County National Bank and Trust Company of Santa Barbara loaned to Mortgage Securities Inc. of Santa Barbara, at its request, the sum of Fifteen Thousand Dollars ($15,000.00) in cash. On or about the 8th day of June, 1931, the County National Bank and Trust Company of Santa Barbara loaned to Mortgage Securities Inc. of Santa Barbara, at its request, the sum of Five Thousand Dollars ($5,000.00) in cash. On the 8th day of September, 1931, by reason of the said sum of Twenty Thousand Dollars ($20,000.00) in cash loaned to Mortgage Securities Inc. of Santa Barbara as aforesaid, and to evidence the same, Mortgage Securities Inc. of Santa Barbara did make, execute, and deliver to the said

County National Bank and Trust Company of Santa Barbara its certain promissory note in words and figures as follows, to-wit:

$20,000.00

On the 7th day of December, 1931, Mortgage Securities Inc. of Santa Barbara jointly and severally promises to pay to the order of County National Bank and Trust Company of Santa Barbara, at its office in Santa Barbara, California, Twenty Thousand and 00/100——— Dollars with interest at the rate of 7 per cent. per annum from date until paid, with costs of collection or an attorney's fee in case payment shall not be made at maturity.

Interest payable at maturity, and if not so paid, to thereafter bear the same rate of interest as the principal, and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Payable only in United States Gold Coin, for value received. The makers and endorsers of this note hereby waive diligence, demand, protest and notice.

MORTGAGE SECURITIES INC.
OF SANTA BARBARA
[Seal] FRED D. JACKSON
President
D. W. MONTGOMERY
Secretary

Santa Barbara, California

Dated Sept. 8, 1931

Prior to the 13th day of January, 1938, the said County National Bank and Trust Company of Santa Barbara did set over and assign the said promissory note hereinabove set forth to G. Virginia [18] Kaysser for collection purposes. On the 13th day of January, 1938, by an instrument in writing, the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser did set over and assign the said promissory note to J. H. McCune. J. H. McCune is now, and ever since the said 13th day of January, 1938, has been, the owner and holder of the said promissory note and in possession thereof.

No part of the said debt has been paid by Mortgage Securities Inc. of Santa Barbara, or anyone whomsoever or at all, except that interest thereon was paid by the said Mortgage Securities Inc. of Santa Barbara in a total sum of Eleven Hundred Fifty-five Dollars and Thirty-eight Cents ($1,155.38, which said sum of Eleven Hundred Fifty-five Dollars and Thirty-eight Cents ($1,155.38) is represented by an interest payment of Three Hundred Fifty Dollars ($350.00) made by Mortgage Securities Inc. of Santa Barbara on December 7, 1931, and an interest payment of Eight Hundred Five Dollars and Thirty-eight Cents ($805.38) representing funds on deposit to the credit of Mortgage Securities Inc. of Santa Barbara at the County National Bank and Trust Company of Santa Barbara, which said amount of Eight Hundred Five Dollars and Thirty-eight Cents ($805.38) was ap-

plied to the said indebtedness on or about October 18, 1934.

From the 16th day of December, 1936, to and including the 4th day of November, 1937, various stockholders of Mortgage Securities Inc. of Santa Barbara, by reason of their statutory stockholder's liability did pay to the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser a total sum of Eighteen Thousand Nine Hundred Sixty-nine Dollars and Seventy Cents ($18,969.70), in satisfaction of such said stockholder's liability. The total amount of the present indebtedness of the said Mortgage Securities Inc. of Santa Barbara on the note obligation herein set forth is now the principal sum of Twenty Thousand Dollars ($20,000.00), together with interest thereon from [19] September 8th, 1931, to date, at the rate of 7% per annum, less the total sum of Eleven Hundred Fifty-five Dollars and Thirty-eight Cents ($1,155.38) heretofore paid as interest as hereinabove set forth.

On the 6th day of November, 1935, the said G. Virginia Kaysser, as assignee of the said promissory note, did file an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities Inc. of Santa Barbara, praying judgment upon said promissory note, which said action is still pending in such said Superior Court.

IV.

On or about the 14th day of May, 1931, in the said City of Santa Barbara, the County National Bank and Trust Company of Santa Barbara loaned to Mortgage Securities Inc. of Santa Barbara, at its request, the sum of Ten Thousand Dollars ($10,000.00) in cash. On or about the 12th day of August, 1931, by reason of the said sum of Ten Thousand Dollars ($10,000.00) loaned to Mortgage Securities Inc. of Santa Barbara as aforesaid, and to evidence the same, Mortgage Securities Inc. of Santa Barbara did make, execute, and deliver to the said County National Bank and Trust Company of Santa Barbara its certain promissory note in words and figures as follows, to-wit:

"$10,000.00 On the 10th day of November, 1931, Mortgage Securities Inc. of Santa Barbara jointly and severally promise to pay to the order of County National Bank and Trust Company of Santa Barbara, at its office in Santa Barbara, California,

Ten Thousand and 00/100 Dollars

with interest at the rate of seven per cent. per annum from date until paid, with costs of collection or an attorney's fee in case payment shall not be made at maturity.

Interest payable at maturity, and if not so paid, to thereafter bear the same rate of interest as the principal and should the interest not be paid when due, then the whole sum of prin-

cipal and interest shall become immediately due and payable at the option of the holder of this note. Payable only in United States Gold Coin, for value received. The makers and endorsers of this note hereby waive diligence, demand, protest and notice. [20]

MORTGAGE SECURITIES INC.
OF SANTA BABARA
[Seal] FRED D. JACKSON
President
D. W. MONTGOMERY
Secretary

Santa Barbara, California

Dated August 12, 1931

Prior to the 13th day of January, 1938, the said County National Bank and Trust Company of Santa Barbara did set over and assign the said promissory note to G. Virginia Kaysser for collection purposes. On the 13th day of January, 1938, by an instrument in writing, the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser did set over and assign the said promissory note to J. H. McCune. J. H. McCune is now, and ever since the said 13th day of January, 1938, has been, the owner and holder of the said promissory note and in possession thereof.

No part of the said debt has been paid by Mortgage Securities Inc. of Santa Barbara, or anyone

whomsoever or at all, except that interest thereon has been paid to November 10th, 1931. The total amount of the present indebtedness of the said Mortgage Securities Inc. of Santa Barbara on the said note obligation upon just hereinabove set forth is now the principal sum of Ten Thousand Dollars ($10,000.00), together with interest thereon from November 1st, 1931, to date, at the rate of seven (7%) per cent per annum.

On the 6th day of November, 1935, the said G. Virginia Kaysser, as assignee of the said promissory note, did file an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities Inc. of Santa Barbara, praying judgment upon said promissory note, which said action is still pending in such said Superior Court.

V

On or about the 28th day of June, 1927, in the said City of Santa Barbara, Winsor Soule loaned to Mortgage Securities Inc. [21] of Santa Barbara, at its request, the sum of Five Thousand Dollars ($5,000.00) in cash. On the first day of November, 1931, by reason of the said sum of Five Thousand Dollars ($5,000.00) in cash loaned to Mortgage Securities Inc. of Santa Barbara as aforesaid, and to evidence the same, Mortgage Securities Inc. of Santa Barbara did make, execute, and deliver to

the said Winsor Soule its certain promissory note in words and figures as follows, to-wit:

"$5,000.00

Santa Barbara, California,

November 1, 1931

On demand, for value received, Mortgage Securities Inc., of Santa Barbara promise to pay to Winsor Soule, or order, at Santa Barbara, California the sum of Five Thousand and 00/100——Dollars ($5,000.00), with interest thereon from date until paid at the rate of seven per cent per annum, said interest payable Dec, Mar, June, Sept., and both principal and interest payable only in current lawful money of the United States. And in case payment of this note, or any portion thereof, shall not be made at maturity, and suit be brought to enforce collection thereof, further agree to pay the additional sum of dollars in like lawful money, as and for an attorney's fee.

MORTGAGE SECURITIES INC.
OF SANTA BARBARA
FRED D. JACKSON
President
ALICE W. JACKSON
Assistant Secretary"

On or about the 10th day of October, 1934, in the City of Santa Barbara, County of Santa Barbara, State of California, the said Winsor Soule did en-

dorse said promissory note hereinabove described by writing on the back thereof the following words: "Without recourse pay to the order of.....", and appending his signature thereto.

At such time and place, for a good and valuable consideration, the said Winsor Soule did deliver the said promissory note just hereinabove set out, together with the endorsement on the back thereof just above described, to Alice W. Jackson. The said promissory note, together with the endorsement thereof, has, since the said 10th day of October, 1934, at all times remained, and now is, [22] in the possession of the said Alice W. Jackson.

No part of the said debt has been paid by Mortgage Securities Inc. of Santa Barbara, or anyone whomsoever or at all. The total amount of the present indebtedness of the said Mortgage Securities Inc. of Santa Barbara on the said note obligation is now the principal sum of Five Thousand Dollars ($5,000.00), together with interest thereon from November 1st, 1931, to date, at the rate of seven (7%) per cent per annum.

On the 13th day of October, 1934, the said Alice W. Jackson did file an action in the Superior Court of the State of California in and for the County of Santa Barbara against Mortgage Securities Inc. of Santa Barbara, a corporation, praying judgment against the said Mortgage Securities Inc. of Santa Barbara upon the said promissory note in the principal sum of Five Thousand Dollars ($5,000.00),

together with interest thereon from the first day of November, 1931. This action is still pending in the said Superior Court of the State of California in and for the County of Santa Barbara.

VI

At all times herein mentioned, the whole amount of the subscribed and issued capital stock of Mortgage Securities Inc. of Santa Barbara, a corporation, was represented by, and consisted of, four thousand four shares (4,004). At all times herein mentioned Fred D. Jackson and Alice P. Jackson have been, and are now, stockholders of Mortgage Securities Inc. of Santa Barbara, a corporation, and now own and hold shares of stock of the said Mortgage Securities Inc. of Santa Barbara, a corporation, as follows, to-wit:

Preferred Stock—492½ shares
Common Stock—450 shares

On or about the 10th day of May, 1938, an involuntary petition in bankruptcy against Mortgage Securities Inc. of Santa [23] Barbara, a corporation, was filed in the within action by First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson, and Catherine Davidson. A true copy of such said petition is attached hereto marked Exhibit "A", being hereby incorporated herein to the same force and effect as if set out here in its exact words and figures. On the 1st day of June, 1938, purportedly after service

of subpoena on Mortgage Securities Inc. of Santa Barbara, a corporation, and after the failure of the said Mortgage Securities Inc. of Santa Barbara to appear in answer to said involuntary petition in bankruptcy and the subpoena issued thereon the above entitled Court did make and enter its order of adjudication herein, declaring and adjudicating the said Mortgage Securities Inc. of Santa Barbara, a corporation, a bankrupt. A true and correct copy of such said order of adjudication is attached hereto marked Exhibit "B", being hereby incorporated herein to the same force and effect as if set out here in its exact words and figures.

VIII

Under the said order of adjudication in bankruptcy hereinabove mentioned and set out as Exhibit "B" hereof, the said bankruptcy matter was referred to Hugh J. Weldon, one of the Referees in Bankruptcy, whose office is at 15 West Carrillo Street, Santa Barbara, California. Subsequent to the said order of adjudication and reference, the said Hugh J. Weldon, Referee in Bankruptcy, did purportedly call a meeting of creditors of Mortgage Securities Inc. of Santa Barbara, the purported bankrupt, and George Giovanola was purportedly elected and appointed Trustee in Bankruptcy, of the estate of Mortgage Securities Inc. of Santa Barbara. The said Hugh J. Weldon and George Giovanola, ever since such said time have

acted, or purported to act, as the Referee in Bankruptcy, and the Trustee in Bankruptcy, respectively, in the within matter.

IX

The petition in involuntary bankruptcy filed herein as [24] aforesaid, a copy thereof being attached hereto as Exhibit "A", alleges that the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson, and Catherine Davidson, the petitioners therein, have provable claims against Mortgage Securities Inc. of Santa Barbara which amount in aggregate to a sum in excess of Five Hundred Dollars ($500.00) over and above any securities held by them.

The claim of the First National Trust and Savings Bank of Santa Barbara, as alleged in said petition in involuntary bankruptcy, is founded upon certain money loaned to Mortgage Securities Inc. of Santa Barbara as evidenced by certain promissory notes described therein. Prior to the filing of the said involuntary petition in bankruptcy, however, such said promissory notes, together with the consideration upon which they were based, were set over and assigned by the said First National Trust and Savings Bank of Santa Barbara to G. Virginia Kaysser. On the 9th day of July, 193 , the said G. Virginia Kaysser did institute an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities Inc. of Santa Barbara upon said

promissory notes, and for judgment upon the amount due thereon, which said action is still pending in the said Superior Court of the State of California, in and for the County of Santa Barbara. The petitioners herein are informed and believe, and upon such information and belief allege, that at the time of the filing of the said involuntary petition in bankruptcy, and ever since such said time, the said First National Trust and Savings Bank of Santa Barbara did not have, and do not now have, any claim whatsoever against the said Mortgage Securities Inc. of Santa Barbara all of such said claims and promissory notes having theretofore been set over and assigned to G. Virginia Kaysser, who was at such said time, and ever since has been, the owner and holder thereof.

With respect to the purported claim of Horace P. Hoefer [25] against Mortgage Securities Inc. of Santa Barbara, as set forth in the said involuntary petition in bankruptcy, such said involuntary petition in bankruptcy alleges that the said Horace P. Hoefer was at all times therein mentioned and prior to 1931 a stockholder of Mortgage Securities Inc. of Santa Barbara, and as such stockholder was liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Horace P. Hoefer bore to the whole of the subscribed capital stock of Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy alleges that the said Horace P. Hoefer did, on October 15th,

1936, by reason of a demand from certain creditors of Mortgage Securities Inc. of Santa Barbara, pay to such said creditors the sum of Two Hundred Ninety-Six Dollars ($296.00) in satisfaction of his proportionate stockholders' liability to such said creditors and as payment of a proportionate share of such said creditors' claims against Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy further alleges that by reason of such said payment, the said Horace P. Hoefer has a provable claim in the sum of Two Hundred Ninety-Six Dollars ($296.00) against Mortgage Securities Inc. of Santa Barbara.

It appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the said Horace P. Hoefer at the time stated was, together with others, a stockholder of Mortgage Securities Inc. of Santa Barbara and liable as such stockholder for the proportionate payment of the debts of Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Horace P. Hoefer bore to the whole of the subscribed capital stock of Mortgage Securities Inc. of Santa Barbara. It further appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the purported claim of Horace P. Hoefer, alleged to be a provable creditor's claim against Mortgage Securities [26] Inc. of Santa Barbara, is predicated and founded on the

fact that as such stockholder, the said Horace P. Hoefer paid a proportionate share of certain creditors' claims against Mortgage Securities Inc. of Santa Barbara, and thereupon become subrogated to the extent of such payment to the creditors' claims against the Mortgage Securities Inc. of Santa Barbara.

The true facts in connection with the purported provable claim of Horace P. Hoefer against Mortgage Securities Inc. of Santa Barbara, as set forth in the petition in involuntary bankruptcy, are as follows. At all times herein mentioned the said Horace P. Hoefer was a stockholder of Mortgage Securities Inc. of Santa Barbara and owned and held and had subscribed to and for eight shares of the capital stock of Mortgage Securities Inc. of Santa Barbara. The First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara were creditors of Mortgage Securities Inc. of Santa Barbara by reason of money loaned to Mortgage Securities Inc. of Santa Barbara as set forth in Paragraph II, IV, and IX above. The said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, for the purpose of enforcing their rights against the stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Horace P. Hoefer, assigned their respective creditors' claims to G. Virginia Kaysser.

The said G. Virginia Kaysser thereupon commenced an action in the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California, against various stockholders of Mortage Securities Inc. of Santa Barbara, including the said Horace P. Hoefer, to collect from such said stockholders the amount of their proportionate liability for payment of a proportionate amount of such said claims. The said Horace P. Hoefer thereupon paid to the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser the said sum [27] of Two Hundred Ninety-Six Dollars ($296.00) in payment of his liability as a stockholder of Mortgage Securities Inc. of Santa Barbara for the proportionate payment by him of such said creditors' claims, one of which claims being the claim of the First National Trust and Savings Bank of Santa Barbara as heretofore assigned to G. Virginia Kaysser as hereinabove set forth, and being the claim set forth in the involuntary petition in bankruptcy on file herein.

The said purported provable claim of Horace P. Hoefer, as appears from the facts hereinabove set forth, and as appears from the facts and allegations of the said involuntary petition in bankruptcy, and on the face thereof, is not, and never was, a direct claim against Mortgage Securities Inc. of Santa Barbara, but was, and is, solely advanced and

presented as, and arises solely from, the purported right of the said Horace P. Hoefer to be partially subrogated to the claims of the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, as assigned to the said G. Virginia Kaysser, against Mortgage Securities Inc. of Santa Barbara to the extent of Two Hundred Ninety-Six Dollars ($296.00), being the amount paid by the said Horace P. Hoefer in payment for discharge of such said stockholders' liability for the proportionate payment of such said claims.

With respect to the purported claim of Peter Davidson and Catherine Davidson against Mortgage Securities Inc. of Santa Barbara, as set forth in the said involuntary petition in bankruptcy, such said involuntary petition in bankruptcy alleges that the said Peter Davidson and Catherine Davidson were at all times therein mentioned and prior to 1931 stockholders of Mortgage Securities Inc. of Santa Barbara, and as such stockholders were liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Peter Davidson and Catherine Davidson bore to the whole of the subscribed capital stock of [28] Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy alleges that the said Peter Davidson and Catherine Davidson did, on October 15th, 1936, by reason of a demand from certain creditors of Mortgage Securities

Inc. of Santa Barbara, pay to such said creditors the sum of Five Hundred Fifty-Five Dollars ($555.00) in satisfaction of their proportionate stockholders' liability to such said creditors and as payment of a proportionate share of such said creditors' claims against Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy further alleges that by reason of such said payment, the said Peter Davidson and Catherine Davidson have a provable claim in the sum of Five Hundred Fifty-Five Dollars ($555.00) against Mortgage Securities Inc. of Santa Barbara.

It appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the said Peter Davidson and Catherine Davidson at the time stated were, together with others, stockholders of Mortgage Securities Inc. of Santa Barbara and liable as such stockholders for the proportionate payment of the debts of Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Peter Davidson and Catherine Davidson bore to the whole of the subscribed capital stock of Mortgage Securities Inc. of Santa Barbara. It further appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the purported claim of Peter Davidson and Catherine Davidson, alleged to be a provable creditors' claim against Mortgage Securities Inc. of Santa Barbara, is predicated and

founded on the fact that as such stockholders, the said Peter Davidson and Catherine Davidson paid a proportionate share of certain creditors' claims against Mortgage Securities Inc. of Santa Barbara, and thereupon become subrogated to the extent of such payment to the creditors' claims against the Mortgage Securities Inc. of Santa Barbara. [29]

The true facts in connection with the purported provable claim of Peter Davidson and Catherine Davidson against Mortgage Securities Inc. of Santa Barbara, as set forth in the petition in involuntary bankruptcy, are as follows. At all times herein mentioned the said Peter Davidson and Catherine Davidson were stockholders of Mortgage Securities Inc. of Santa Barbara and owned and held and had subscribed to and for.....shares of the capital stock of Mortgage Securities Inc. of Santa Barbara. The First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara were creditors of Mortgage Securities Inc. of Santa Barbara by reason of money loaned to Mortgage Securities Inc. of Santa Barbara as set forth in Paragraphs III, IV, and IX above. The said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, for the purpose of enforcing their rights against the stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Peter Davidson and Catherine Davidson, assigned

their respective creditors' claims to G. Virginia Kaysser. The said G. Virginia Kaysser thereupon commenced an action in the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California, against various stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Peter Davidson and Catherine Davidson to collect from such said stockholders the amount of their proportionate liability for payment of a proportionate amount of such said claims. The said Peter Davidson and Catherine Davidson thereupon paid to the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser the said sum of Five Hundred Fifty-Five Dollars ($555.00) in payment of their liability as stockholders of Mortgage Securities Inc. of Santa Barbara for the proportionate payment of and by them of such said creditors' claims, one of which [30] claims being the claim of the First National Trust and Savings Bank of Santa Barbara as heretofore assigned to G. Virginia Kaysser as hereinabove set forth, and being the claim set forth in the involuntary petition in bankruptcy on file herein.

The said purported provable claim of Peter Davidson and Catherine Davidson, as appears from the facts hereinabove set forth, and as appears from the facts and allegations of the said involuntary petition in bankruptcy, and on the face thereof, is

now, and never was, a direct claim against Mortgage Securities Inc. of Santa Barbara, but was, and is, solely advanced and presented as, and arises solely from, the purported right of the said Peter Davidson and Catherine Davidson to be partially subrogated to the claims of the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, as assigned to the said G. Virginia Kaysser, against Mortgage Securities Inc. of Santa Barbara to the extent of Five Hundred Fifty-Five Dollars ($555.00), being the amount paid by the said Peter Davidson and Catherine Davidson in payment for discharge of such said stockholders' liability for the proportionate payment of such said claim.

X

Prior to the filing of the involuntary petition in bankruptcy herein, or at any time whatsoever or at all, the said Horace P. Hoefer and the said Peter Davidson and the said Catherine Davidson, or any or either of them, did not request or demand in any manner whatsoever or at all, individually or collectively, that the said First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser, or any or either of them, proceed, or take any proceedings or actions, or file any petition in bankruptcy, against Mortgage Securities Inc. of Santa Barbara to en-

force [31] payment of the claim of the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser, or either or any of such said claims, to a portion of which claims the said Horace P. Hoefer and Peter Davidson and Catherine Davidson claim to have been subrogated as set forth above. Prior to the filing of the involuntary petition in bankruptcy herein, the said G. Virginia Kaysser, as assignee of the said County National Bank and Trust Company of Santa Barbara had instituted an action in the Superior Court of the State of California in and for the County of Santa Barbara for the purpose of enforcing payment of such said claim, which said action is still pending. Prior to the filing of the said involuntary petition in bankruptcy, the said G. Virginia Kaysser, as assignee of the said First National Trust and Savings Bank of Santa Barbara, had instituted an action in the Superior Court of the State of California in and for the County of Santa Barbara for the purpose of enforcing payment of such said claim, which said action is still pending.

XI

That by reason of all the facts and circumstances hereinabove set forth, and by reason of the facts and circumstances appearing in and on the face of the said involuntary petition in bankruptcy on file herein, the said First National Trust and Savings

Bank of Santa Barbara, the said Horace P. Hoefer, and the said Peter Davidson, and the said Catherine Davidson, or any or either of them, did not at any time or at all, and in particular did not at the time of the filing of the said involuntary petition in bankruptcy, have provable claims against the said Mortgage Securities Inc. of Santa Barbara, which said fact appears not only from the facts and allegations herein set forth but from the facts and allegations set forth in the said involuntary petition in bankruptcy. By reason of such said facts and allegations, and by [32] reason of the fact that such said parties, or any or either of them, did not have a provable claim against Mortgage Securities Inc. of Santa Barbara, the within Court did not at the time of the filing of the said involuntary petition in bankruptcy, and has not at any time since, had or acquired any jurisdiction whatsoever or at all to declare and adjudge Mortgage Securities Inc. of Santa Barbara, a corporation, bankrupt.

XII

Subsequent to the reference of the said bankruptcy matter to Hugh J. Weldon, Referee in Bankruptcy, as aforesaid, a purported first meeting of creditors was held on the first day of July, 1938, at which meeting the said George Giovanola was purportedly elected Trustee of the estate of the said bankrupt.

Subsequent to the said first day of July, 1938, no meeting of creditors and no other proceedings

whatsoever were had in the said bankruptcy matter until the second day of February, 1939, on which date, the said Referee did purportedly hold an adjourned creditors' meeting for the purpose of examining witnesses. The petitioners herein, through their attorney, appeared at such meeting and presented objections to the holding of such meeting and to any further proceedings in the bankruptcy matter whatsoever on the ground that the involuntary petition in bankruptcy on file herein is insufficient on its face to give the within Court jurisdiction to make the purported adjudication in bankruptcy, and upon the ground that the within Court, or the said Referee, had no jurisdiction over the proceeding. Upon hearing such objections, the Referee overruled the same and proceeded with such purported meeting.

A subsequent meeting was called by the said Referee on the 21st day of February, 1939, at which time the petitioners again appeared and presented the same objections to such said hearing, which objections were again overruled. At both of such meetings the petitioners stated to, and notified, the said Referee in Bankruptcy [33] that a petition would be prepared and presented to the within Court asking for the relief hereinafter prayed.

The trustee in Bankruptcy has not at any time taken possession of, or had in his possession, any assets of the alleged bankrupt.

XIII

At the time of the service of subpoena upon the alleged bankrupt herein by service thereof upon its officers, the officers of such said corporation did not notify the directors, stockholders, or creditors of the said bankrupt, or any or either of them, of such said bankruptcy proceedings, and did allow such said purported adjudication in bankruptcy to be made without opposing such said petition and without notifying the directors, stockholders, or creditors of such said bankrupt of such said proceedings.

Upon the first occasion presented after obtaining knowledge of the facts and circumstances involved in such said bankrupt proceedings and of the form and contents of such said involuntary petition in bankruptcy, such occasion being the said purported creditors' meeting held on the second day of February, 1939, the petitioners herein presented their objections to the jurisdiction of the within Court as hereinabove set forth, and ever since such time have objected on each occasion to the jurisdiction of the said Court.

The petitioners had no knowledge of the form or contents of the said involuntary petition in bankruptcy until approximately eight months after the filing of the same, during all of which time no proceedings were had in the bankruptcy matter except as hereinabove set forth. Upon obtaining such knowledge, the petitioners, through T. H. Canfield,

their attorney at that time, carefully investigated the matter of the said involuntary petition in bankruptcy and the adjudication based thereon, the said T. H. Canfield, [34] as attorney for the petitioners, devoting all his available time thereto, being engaged also in other litigation which required a considerable portion of his time. It was deemed advisable to carefully brief the law involved in the instant proceedings before presenting the matter to the within Court, so that the position of the petitioners could be clearly presented to the Court. In the interim, however, the position of the petitioners was presented to the within Court, before the said Hugh J. Weldon, Referee, by way of the objections made to the jurisdiction of the within Court at the hearings before the said Referee as hereinabove related.

The firm of Daily and Gallaudet, Attorneys, have at this time been associated with the said T. H. Canfield, as attorneys for the petitioners.

Wherefore, petitioners pray that they be allowed to appear in within proceedings; that the above entitled Court make and enter its order vacating and setting aside the said adjudication in bankruptcy heretofore made in the within matter against Mortgage Securities Inc. of Santa Barbara upon and at the time of the filing of the said involuntary petition in bankruptcy, and that the above entitled Court make and enter its order dismissing the said

involuntary petition in bankruptcy and all proceedings subsequent thereto.

T. H. CANFIELD
EDWARD GALLAUDET
Attorneys for J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson, Petitioners

(Verified April 19, 1939, by J. H. McCune) [35]

NOTE

Exhibit A, being the original petition in involuntary bankruptcy, is deleted, as such petition is included elsewhere in the record. [Set out at page 5.]

Exhibit B, being the original adjudication in bankruptcy, is deleted, as such adjudication is included elsewhere in the record. [Set out at page 16.]

[Endorsed]: Filed Apr. 20, 1939. [36]

[Title of District Court and Cause.]

PETITION OF INTERVENING CREDITORS

To the Honorable Judge G. Cosgrave, Judge of the above-entitled Court:

This verified petition presented and filed by and on behalf of Thomas J. Smitheram, E. W. Squier and J. F. Goux respectfully shows:

I.

That the Mortgage Securities Inc. of Santa Barbara, the above named bankrupt, is now and at all times herein mentioned has been a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of California, and having had its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California.

II.

That on or about the 10th day of May, 1938, an involuntary petition in bankruptcy against said Mortgage Securities Inc. of Santa Barbara, a corporation, was filed with the Clerk of the above named Court by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter [38] Davidson and Catherine Davidson, to which petition now on file herein reference is hereby had and the same is made a part hereof;

II.

That on the said 1st day of June, 1938, the above named Court did duly and regularly make its order of adjudication herein declaring and adjudicating the said Mortgage Securities Inc. of Santa Barbara, a corporation, bankrupt to which order reference is hereby had and the same is made a part hereof; that under said order of adjudication said bankruptcy matter was referred to Hugh J. Weldon, one of the Referees in bankruptcy whose office is at

Number 15 West Carrillo Street, Santa Barbara, California, and thereafter at a meeting of the creditors of said bankrupt, duly and regularly called by the said Referee, George Giovanola, was elected and appointed Trustee in bankruptcy of the estate of said bankrupt and thereupon became the duly elected, appointed, qualified and acting trustee in bankruptcy of said estate.

III.

That your petitioners, E. W. Squier and J. F. Goux, of Santa Barbara, on the 8th day of July, 1938, filed a proof of unsecured debt and claim with said Referee, Hugh J. Weldon, for the sum of $3,-550.00 claiming and alleging that the said bankrupt was at and before the filing of said petition and still is justly and truly indebted to the said E. W. Squier and J. F. Goux, in said sum for legal services rendered and performed by the said last mentioned petitioners, a copy of which claim is hereunto annexed, marked Exhibit "A" to which reference is hereby had and the same is made a part hereof; that said claim was and is a provable claim in bankruptcy. [39]

IV.

That your petitioner, Thomas J. Smitheram, on the 15th day of September, 1938, filed a proof of unsecured debt or claim against the said Mortgage Securities Inc. of Santa Barbara, with the said Hugh J. Weldon, Referee in Bankruptcy, in the

sum of $433.00 in which said Thomas J. Smitheram claimed and alleged that said bankrupt was and is indebted to said claimant, Thomas J. Smitheram, in said sum for money deposited with the bankrupt as is more fully set forth in said proof of claim a copy of which is hereunto annexed, marked Exhibit "B" to which reference is hereby had and the same is made a part hereof.

V.

That on or about the 20th day of April, 1939, J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, filed a petition for an order vacating adjudication for bankruptcy in which the said petitioners last mentioned alleged and claimed that the creditors namely: Horace P. Hoefer, Peter Davidson and Catherine Davidson, said First National Trust and Savings Bank of Santa Barbara, did not have provable claims against the Mortgage Securities Inc. of Santa Barbara, and praying that said order of adjudication and the proceedings thereafter be dismissed; reference is hereby had to said petition for further particulars.

VI.

That your petitioners herein at the time of the filing of said petition in bankruptcy, prior thereto, and ever since have had and now have provable claims in bankruptcy against said Mortgage Securities Inc. of Santa Barbara, and at all said times were and still are qualified and competent to pe-

tition for the adjudication in bankruptcy of said bankrupt. [40]

VII.

That the hearing of said petition for order vacating adjudication for bankruptcy has not been heard or determined and that the hearing thereof has been set by order of the above named Court on the 29th day of May, 1939, at the hour of ten o'clock A. M. of said day.

Wherefore, your petitioners pray that they and each of them may be joined as intervening petitioning creditors for the adjudication of said Mortgage Securities Inc. of Santa Barbara as a bankrupt to supplement the creditors named in said original petition in bankruptcy and that said petition to vacate said adjudication be denied.

E. W. SQUIER
THOMAS J. SMITHERAM
J. F. GOUX

Petitioners

STANLEY T. TOMLINSON
W. P. BUTCHER

Attorneys for Petitioners

[41]

State of California
County of Santa Barbara—ss:

E. W. Squier, being first duly sworn, deposes and says: That he is one of the petitioners in the foregoing Petition of Intervening Creditors; that

he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

E. W. SQUIER

Subscribed and sworn to before me this 23rd day of May, 1939.

[Seal] J. E. DELWICHE

Notary Public in and for the County of Santa Barbara, State of California. [42]

EXHIBIT "A"

[Title of District Court and Cause.]

Proof of Unsecured Debt

At Santa Barbara, in said Southern District of California, Central Division, on the 8th day of July, 1938, came E. W. Squier and J. F. Goux of Santa Barbara, in the County of Santa Barbara, in said Southern District of California, Central Division, and made oath and say: That Mortgage Securities, Inc., of Santa Barbara, a California corporation, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponents in the sum of Three Thousand Five Hundred and Fifty Dollars ($3,550.00).

That the nature and consideration of said debt is as follows:

That on the 4th day of February, 1934, the action of L. P. Feldmeier, J. C. Fast, H. Henry Ziegler, George N. Thomas and Orray Taft, plaintiffs, vs. Mortgage Securities, Incorporated of Santa Barbara, a corporation, Security Title Insurance and Guarantee Company, a corporation, Gertrude Adderly et al, defendants, No. 25135, was commenced in the Superior Court of the State of California, in and for the County of Santa Barbara, and said action at all times since has continued to be [43] and now remains a pending action; that shortly upon and after the commencement of the above entitled action said Mortgage Securities Inc. of Santa Barbara, a corporation, employed and hired E. W. Squier and J. F. Goux, at all times herein mentioned attorneys at law duly licensed and qualified to practice in all of the court of the State of California, to represent said corporation as its attorneys in said action, and to serve and act as the attorneys of said corporation in said action for which said Mortgage Securities Inc. of Santa Barbara promised and agreed and obligated itself to pay said E. W. Squier and said J. F. Goux reasonable attorneys' fees for services by them to be rendered as such attorneys of said corporation; that said attorneys after said corporation had been duly served with summons in the above-entitled action, appeared for said corporation in said action and have at all times since represented said corporation in said action and have been the only attorneys representing said corporation in said action and acting as the

attorneys of said corporation in said action; that said attorneys for and on behalf of said corporation prepared, served and filed for and on behalf of said corporation numerous, lengthy and complicated pleadings for and on behalf of said corporation and in the defense and protection and assertion of its rights and properties in said action; that the trial of said action held in the Superior Court of the State of California, in and for the County of Santa Barbara, commenced on December 3, 1935, and was held thereafter from time to time throughout the course of more than twenty-three months during which said E. W. Squier and said J. F. Goux were in actual attendance at the trial of the above-entitled action as the attorneys of and for and representing said Mortgage Securities, Inc. of Santa Barbara for more than thirty days of time; that [44] the said action involved the question of validity of all mortgage certificates issued by said Mortgage Securities, Inc. of Santa Barbara and further involved the question of the character and sufficiency of the securities which the aforementioned Security Title Insurance and Guarantee Company was required to hold as trustee to secure the payments of all mortgage certificates duly issued by said Mortgage Securities, Inc. of Santa Barbara and authenticated by said Security Title Insurance and Guarantee Company; further, said action involved the question of the liability of said Mortgage Securities, Inc. of Santa Barbara and of said Security

Title Insurance and Guarantee Company to the holders of the valid mortgage certificates duly issued by said Mortgage Securities, Inc. of Santa Barbara and authenticated by said Security Title Insurance and Guarantee Company; also, said action involved the question of the rights of Mortgage Securities, Inc. of Santa Barbara in and to the properties and funds held by said Security Title Insurance and Guarantee Company as said trustee and in and to whatever, if any, surplus might remain in the hands of said trustee after the payment of the valid mortgage certificates aforementioned duly issued by said Mortgage Securities, Inc. of Santa Barbara and authenticated by said Security Title Insurance and Guarantee Company and after the payment of whatever, if any, other claims might be prior and superior to the right of said Mortgage Securities, Inc. of Santa Barbara to such surplus.

That judgment was duly made, rendered and entered on or about October 6, 1937, in the above-entitled action; that the aforementioned Security Title Insurance and Guarantee Company and Jane V. Reinert, one of the parties to the above-entitled [45] action, subsequent to the entry of the judgment aforementioned each moved for a new trial in said action; but, said motions for a new trial have both been and each of them has been heretofore denied; that said Security Title Insurance and Guarantee Company and said Jane V. Reinert have each appealed from the judgment aforementioned to

the Supreme Court of the State of California, and said appeals are now pending in said Supreme Court of the State of California.

That the judgment and decree aforementioned is greatly to the advantage and profit and pecuniary good and gain of said Mortgage Securities, Inc. of Santa Barbara, its creditors and stockholders in general.

That the sum of $2500.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by said E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc. of Santa Barbara, in the above-entitled action.

That on the 9th day of July, 1935, G. Virginia Kaysser commenced an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities, Inc. of Santa Barbara to recover the amount claimed by her to be due as assignee of The First National Trust and Savings Bank of Santa Barbara, a national banking association, of and under five renewal notes which she claims were executed by Mortgage Securities, Inc. of Santa Barbara for and on account of indebtedness in the principal sum of Fifty Thousand Dollars ($50,000.00) which she claims was for money borrowed by said Mortgage Securities, Inc. of Santa Barbara from said The First National Trust and Savings Bank of Santa Barbara, said borrowed [46] money and indebtedness being evidenced by five certain promissory notes

executed by said Mortgage Securities, Inc. of Santa Barbara and each payable to said bank, or order. In and by her complaint aforementioned said G. Virginia Kaysser alleged and claimed that prior to the commencement of said action said bank aforementioned assigned and transferred to her, said G. Virginia Kaysser, all of said bank's title and interest in and to said original obligation, with interest, and in and to said original and renewal notes. Said action is numbered 26699 on the records of said Court and is still pending.

That on the 6th day of November, 1935, G. Virginia Kaysser commenced an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities, Inc., of Santa Barbara to recover the amount claimed by her to be due as assignee of County National Bank & Trust Company of Santa Barbara, a national banking association, of and under two renewal notes which she claims were executed by Mortgage Securities, Inc., of Santa Barbara for and on account of indebtedness in the principal sum of Thirty Thousand Dollars ($30,000.00) which she claims was for money borrowed by said Mortgage Securities, Inc., of Santa Barbara from said County National Bank & Trust Company of Santa Barbara, said borrowed money and indebtedness being evidenced by three original promissory notes executed by said Mortgage Securities, Inc., of Santa Barbara and each payable to said Bank, or order.

In and by her complaint aforementioned said G. Virginia Kaysser alleged and claimed that prior to the commencement of said action said Bank aforementioned assigned and transferred to her, said G. Virginia Kaysser, all of said Bank's title and interest in and [47] to said original obligation, with interest, and in and to said original and renewal notes. Said action is numbered 27038 on the records of said Court and is still pending.

That on or about the 16th day of October, 1934, Alice W. Jackson commenced an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities, Inc., of Santa Barbara to recover the amount claimed by her to be due as assignee of Winsor Soule for and on account of indebtedness in the principal sum of Five Thousand Dollars ($5,000.00), said indebtedness being evidenced by a promissory note dated November 1, 1931, executed by said Mortgage Securities, Inc. of Santa Barbara and payable to said Winsor Soule, or order. In and by her complaint aforementioned said Alice W. Jackson alleged and claimed that prior to the commencement of said action said Winsor Soule assigned and transferred to her, said Alice W. Jackson, all of said Winsor Soule's title and interest in and to said original obligation, with interest, and in and to said note. Said action is numbered 25941 on the records of said Court and is still pending.

That said Mortgage Securities, Inc., of Santa Barbara, a corporation, has employed and hired E. W. Squier and J. F. Goux to represent said corporation and to serve and act as the attorneys of said corporation in each of said actions, for which Mortgage Securities, Inc., of Santa Barbara promised and agreed and obligated itself to pay said E. W. Squier and said J. F. Goux reasonable attorneys' fees for services by them to be rendered as such attorneys for said corporation; that said attorneys appeared in each of said actions for said corporation and have at all times since represented said corporation in each [48] of said actions and have been the only attorneys representing said corporation in each of said actions.

That the sum of $300.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in the above-entitled action No. 26699.

That the sum of $300.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in the above-entitled action No. 27038.

That the sum of $200.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in the above-entitled action No. 25941.

That said E. W. Squier and J. F. Goux have in matters correlated with and relating and pertaining to the aforementioned actions acted as counsellors and legal advisors of said Mortgage Securities, Inc., of Santa Barbara and for said general legal advice and counsel have rendered valuable services to and for said Mortgage Securities, Inc., of Santa Barbara, for which said Mortgage Securities, Inc., of Santa Barbara has promised and agreed to pay and is obligated to pay said E. W. Squier and J. F. Goux the sum of $250.00 which *said of* $250.00 is a reasonable and just and fair sum as and for the legal services rendered by said E. W. Squier and said J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in said correlated and related matters.

That no part of said debt due, as aforesaid, [49] to deponents, amounting to $3550.00 has been paid; that there are no offsets or counterclaims to the same or any part hereof and the deponents have not, nor has either of them, nor has any person by their order or the order of either of them, or to their knowledge or the knowledge of either of them, or belief, for their use or the use of either of them, had or received any manner of security for said debt whatsoever or any part thereof; that no note has been received for said debt or any part thereof, nor has any judgment been rendered thereon.

E. W. SQUIER

J. F. GOUX

Subscribed and sworn to before me this 8th day of July, 1938.

[Seal] EDWARD J. TREVEY
Notary Public.

My Commission Expires Aug. 6, 1940.

[Endorsed]: Filed U. S. District Court, Jul. 8, 1938. Hugh J. Weldon, Referee in Bankruptcy. [50]

EXHIBIT "B"

[Title of District Court and Cause.]

Proof of Unsecured Debt

At Santa Barbara, in said Southern District of California, on the 13th day of September, A. D. 1938, came Thomas J. Smitheram of Santa Barbara, in the County of Santa Barbara, in said Southern District of California, and made oath, and says that Mortgage Securities Inc. of Santa Barbara, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of Four hundred thirty three dollars; that the nature and consideration of said debt is as follows:

Money deposited with bankrupt for and on account of purchase of 1st mortgage certificate which said certificate was not delivered to claimant; that no part of said debt has been paid; that there are

no set-offs or counterclaims to the same, and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever; that no note has been received for said debt or any part thereof, nor any judgment rendered thereon.

THOMAS J. SMITHERAM

Subscribed and sworn to before me this 13 day of September, A.D. 1938.

[Seal] STANLEY T. TOMLINSON
Notary Public in and for the
County of Santa Barbara,
State of California.

[Endorsed]: Filed: Sep. 15, 1938. Hugh J. Weldon, Referee in Bankruptcy. [51]

In the District Court of the United States
Southern District of California

Central Division

No. 31965-C

In Bankruptcy

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA BARBARA, a corporation,

Bankrupt.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION OF INTERVENING CREDITORS

It is discretionary with the Court to allow intervention of creditors to join in the involuntary petition in bankruptcy after adjudication, since the Court in view of the pending petition for order vacating adjudication for bankruptcy does not lose jurisdiction of the proceedings.

In re, Jutte, 258 Fed. 422.

In re, First National Bank, 152 Fed. 64.

Sandusky v. National Bank, 90 U. S. 289 at 293.

In re, Kottenai Motor Co. 41 Fed (2d) 403

The Bankrupcty Act of 1898, Section 59, Sub. (f)

provides:

"Creditors other than original petitioners may *at any time* enter their appearance and

join in the petition etc." (The italics are the writer's.)

See also Remington on Bankruptcy, Vol. 1, Sec. 233.

Respectfully submitted,
STANLEY T. TOMLINSON
W. P. BUTCHER
Attorneys for Petitioners

[Endorsed]: Petition of Intervening Creditors filed May 23, 1939. [52]

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR AN ORDER VACATING ADJUDICATION

Now comes George Giovanola as Trustee in Bankruptcy of the above named bankrupt in the above-entitled proceedings, and moves the Court for an order dismissing, with costs, the petition for an order vacating adjudication for bankruptcy filed in said proceeding on the 20th day of April, 1939, and this he asks upon the ground that said petition does not state facts sufficient to constitute grounds for vacating the order of adjudication in that:

First: It does not appear on the face of the petition for involuntary bankruptcy that the Court did not have the jurisdiction of said proceedings and to make its order for adjudication.

Second: That as appears from said petition, said J. H. McCune claims to be the assignee of the County National Bank and Trust Company of Santa Barbara of an alleged claim of said County National Bank and Trust Company of Santa Barbara against said bankrupt, evidenced by certain promissory notes made by said bankrupt; and Alice W. Jackson, claims to be the assignee or transferee of Winsor Soule of a certain alleged claim of said Winsor Soule against said bankrupt, evidenced by a promissory note alleged to have been made by said bankrupt in favor of said Winsor Soule that as such assignees of said claims, respectively, they have, and each of them have not been, nor are they, nor will they be prejudiced or damaged by said adjudication. [54]

That said petitioners Fred D. Jackson and Alice P. Jackson claim to own certain preferred stock and certain common stock of said Mortgage Securities, Inc., of Santa Barbara, as alleged in Paragraph VI of their petition herein, and it does not appear that they have any interest in the above-entitled bankruptcy matter, other than their interest as such stockholders; that said Fred D. Jackson and Alice P. Jackson are not qualified or authorized as such stockholders, or otherwise, to question the jurisdiction of this Court in the above-entitled bankruptcy proceeding or the jurisdiction of this Court to make the adjudication of bankruptcy herein, in that it does not appear that they, or either

of them, took, or attempted to take any action or to cause the officers of said Mortgage Securities, Inc. of Santa Barbara to take any action in respect to the above-entitled proceeding, or to resist or oppose the petition to have said Mortgage Securities, Inc. of Santa Barbara, adjudged a bankrupt, or to have the adjudication made herein set aside; that they, and each of them, have not been, nor are they, nor will they be prejudiced or damaged by said adjudication.

Third: That it appears from said petition that the petitioners named in the petition for involuntary bankruptcy of the above named bankrupt was made and filed by creditors having provable claims in bankruptcy, namely: a claim on the part of the First National Trust and Savings Bank founded upon a promissory note, and claims of stockholders who paid their proportionate liability, and under Section 322-A of the Civil Code of the State of California, had a direct claim against the above named bankrupt and not by virtue of any assignment or splitting of any claim as alleged by said objecting petitioners.

Fourth: That it appears on the face of said proceedings that the petitioners, J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson, have been guilty of laches and un- [55] reasonable delay in objecting to the adjudication in bankruptcy in that said petitioners were creditors at the time of the filing of said involuntary petition in

bankruptcy namely: on the 1st day of June, 1938, and until the filing of their petition made no motion or filed any petition before the above named Court to vacate or set aside said order of adjudication, filed claims against said bankrupt, attended the meetings of creditors before the Referee in Bankruptcy, made no objection prior to the order of adjudication to said proceedings, and allowed and permitted the Trustee in Bankruptcy to act in his capacity, as such, from and after his appointment and qualification; and for a long period of time and until the 20th day of April, 1939, took no steps whatever before the above named Court to object to its jurisdiction or to vacate said order of adjudication and under the presumption that an officer regularly and duly performed his duties, said trustee has duly and regularly performed his duties during all of said period of time as an officer of the above named Court and as appears in the records and files before the Referee in Bankruptcy, has instituted an action as said trustee against the said Fred D. Jackson, Alice P. Jackson, Alice W. Jackson and others to recover certain assets of said bankrupt corporation which were fraudulently conveyed to said parties to deprive the creditors of the benefit of the assets of said corporation reference being had to the records of said Referee in Bankruptcy for further particulars; that it was not until the filing of said action by said Trustee; namely: on the 10th day of March, 1939, did said parties file

their petition to set aside said order of adjudication; that said records and files of said Referee further disclosed that said J. H. McCune, Alice W. Jackson and Alice P. Jackson, filed claims in bankruptcy against said bankrupt corporation with said Referee.

Dated: May 26th, 1939.

W. P. BUTCHER
Attorney for George Giovanola
as Trustee in Bankruptcy

[Endorsed]: Filed May 29, 1939. [56]

[Title of District Court and Cause.]

ANSWER TO "PETITION OF INTERVENING CREDITORS"

Come now J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, and answer the "Petition of Intervening Creditors" filed herein by Thomas J. Smitheram, E. W. Squier, and J. F. Goux, and admit, deny, and allege as follows, to-wit:

I

J. H. McCune is now, and ever since the 13th day of January, 1938, has been, the owner and holder of certain promissory notes executed by the above named bankrupt, and a creditor of such said bankrupt with a claim provable in bankruptcy, all of

which, together with all facts and circumstances in connection therewith, is set forth in detail in the "Petition for Order Vacating Adjudication for Bankruptcy" heretofore filed herein, which said "Petition for Order Vacating Adjudication for Bankruptcy" is hereby incorporated herein by reference to the same force and effect as if set out here in its exact words and figures, reference thereto being hereby made.

Alice W. Jackson is the owner and holder of a certain promissory note executed by Mortgage Securities Inc. of Santa Barbara, bankrupt above named, and is now, and ever since the 10th day of October, 1934, has been, a creditor of the said bankrupt with a provable claim in bankruptcy, all of which, together with [57] the details thereof, is set forth in the "Petition for Order Vacating Adjudication for Bankruptcy" on file herein, and hereinabove incorporated in this answer, reference thereto being hereby made.

Fred D. Jackson and Alice P. Jackson at all times herein mentioned have been, and now are, stockholders of Mortgage Securities Inc. of Santa Barbara, a corporation, bankrupt above named, and now own and hold shares of stock of the said corporation as follows, to-wit:

Preferred Stock	492½ shares
Common Stock	450 "

II

Answering the allegations of paragraph II appearing on page 2, of the "Petition of Intervening Creditors," these answering parties admit that on the first day of June, 1938, the above entitled Court did make an order purporting to adjudicate Mortgage Securities Inc. of Santa Barbara, a corporation, a bankrupt; admit that a purported order of reference was made to Hugh J. Weldon, a Referee in Bankruptcy; and admit that George Giovanola claims to be the elected Trustee in Bankruptcy of the estate of the said purported bankrupt. Other than herein admitted, these answering parties deny generally and specifically each and every allegation of such said paragraph II, and the whole thereof.

III

Answering the allegations of paragraph VI of the said "Petition of Intervening Creditors," these answering parties deny that at any time or at all the said Thomas J. Smitheram had, or now has, a provable claim in bankruptcy against Mortgage Securities Inc. of Santa Barbara; and deny that the said Thomas J. Smitheram at the times mentioned in the said paragraph VI, or at any other time whatsoever or at all, was or is qualified and competent, or qualified, or competent, to petition for the adjudication in bank- [58] ruptcy of the said bankrupt. In this connection, these answering parties allege that the purported claim of Thomas J. Smitheram against

Mortgage Securities Inc. of Santa Barbara, if any, at the time of the said petition in bankruptcy herein, was, and now is, barred by the provisions of Sections 337, 338, and 339, Code of Civil Procedure of the State of California.

And for a Second, Separate and Distinct Defense,

These Answering Parties Allege:

I

The said "Petition of Intervening Creditors" fails to state or set forth sufficient facts upon which the relief requested may be granted, and fails to state sufficient facts to establish that the said petitioners have provable claims in bankruptcy or are entitled to intervene in the above entitled action.

And for a Third, Separate, and Distinct Defense,

These Answering Parties Allege:

I

That the above entitled Court has no jurisdiction to grant the said "Petition of Intervening Creditors" in that a purported adjudication has been made and entered in the within action, and in that the involuntary petition in bankruptcy on file herein is insufficient on its face, and does not state sufficient facts, to give the above entitled Court jurisdiction of the within proceedings, or to entitle the said petitioners to intervene herein.

Wherefore, these answering parties pray that the "Petition of Intervening Creditors" be denied and dismissed.

T. H. CANFIELD
Attorney for J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson. [59]

State of California
County of Santa Barbara—ss.

Fred D. Jackson, being duly sworn, deposes and says:

That he is an answering party in the above entitled bankruptcy matter; that he has read the foregoing Answer to "Petition of Intervening Creditors" and knows the contents thereof; and that the facts and allegations therein set forth are within his own knowledge and are true.

FRED D. JACKSON

Subscribed and sworn to before me, this 26th day of May, 1939.

[Seal] T. H. CANFIELD
Notary public in and for said County and State.

[Endorsed]: Filed May 29, 1939. [60]

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDER VACATING ADJUDICATION FOR BANKRUPTCY

Before the Honorable Judge Cosgrave, Judge of the Above Entitled Court:

This verified answer of First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, and Peter Davidson and Catherine Davidson, petitioning creditors herein, respectfully shows:

I.

Answering the allegations of paragraph IX of said petition, these petitioning creditors allege that the assignment by First National Trust and Savings Bank of Santa Barbara to G. Virginia Kaysser, referred to in said paragraph IX, was made solely and exclusively for the purpose of enforcing collection of said promissory notes; that prior to the filing of the involuntary petition in bankruptcy herein, the said G. Virginia Kaysser did reassign and retransfer said promissory notes to First National Trust and Savings Bank of Santa Barbara and at the time of the filing of the petition herein the said First National Trust and Savings Bank of Santa Barbara was the owner and holder of said notes and of all right, title and interest therein and thereto; further answering said paragraph IX, and particularly the second paragraph contained on page 12 of said petition, these petitioning creditors

allege that the claim of Horace P. Hoefer is a valid outstanding and provable claim against the bankrupt herein and is a direct and primary obligation of said bankrupt; further [61] answering the allegations of paragraph IX of said petition, and particularly the second paragraph on page 15 thereof, these petitioning creditors allege that the claim of Peter Davidson and Catherine Davidson is a valid outstanding and provable claim against the bankrupt herein and is a direct and primary obligation of said bankrupt.

II.

Answering the allegations of paragraph X of said petition commencing with the words "Prior to the filing" and ending with the words "subrogated as set forth above" these petitioning creditors deny each and every allegation therein contained.

III.

Answering the allegations of paragraph XI of said petition, these petitioning creditors deny each and every allegation therein contained and the whole thereof.

IV.

Answering the allegations of paragraph XIII of said petition, these petitioning creditors deny each and every allegation therein contained; further answering said paragraph, these petitioning creditors allege that on the 25th day of June, 1938, Hugh J. Weldon, the duly appointed, qualified and acting

referee herein cause to be published notice of the adjudication in bankruptcy and notice that the first meeting of creditors would be held on the 8th day of July, 1938; that the said J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson did at that time obtain full knowledge and information of the form and contents of said involuntary petition in bankruptcy and were fully advised of all proceedings taken herein; that by reason of their laches and inexcusable delay, said petitioners are estopped from now objecting to the proceedings herein and from further prosecuting their petition to set aside the adjudication [62] in bankruptcy.

V.

Further answering said petition for order vacating adjudication, these petitioning creditors allege that if it be determined that stockholders of Mortgage Securities, Inc. of Santa Barbara, who have heretofore paid their proportionate stockholders' liability in payment of debts and obligations of said Mortgage Securities, Inc. of Santa Barbara, do not have provable claims herein, then and in that event the number of creditors with provable claims against said bankrupt as of the date of the filing of the petition herein and as of the date of the order of adjudication were less than twelve (12) in number and under the provisions of Section 59(b) of the Bankruptcy Act of 1938, one creditor having a provable claim amounting in excess of the value of

securities held, if any, to Five Hundred Dollars ($500.00) may file an involuntary petition in bankruptcy.

Wherefore, these petitioning creditors pray that the petition of the said J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson be denied.

Dated: This 26th day of May, 1939.

JOHN WILLIAM HEANEY
FRANCIS PRICE
A. C. POSTEL
HAROLD A. PARMA
By HAROLD A. PARMA
Attorneys for said petitioning creditors. [63]

State of California
County of Santa Barbara
City of Santa Barbara—ss.

Chas. W. Hague, Assistant Vice President of the First National Trust and Savings Bank of Santa Barbara, one of the petitioning creditors mentioned in the foregoing Answer to Petition for Order Vacating Adjudication for Bankruptcy, and duly authorized to make this oath on behalf of said petitioning creditor, does hereby *made* solemn oath that the statements of fact contained in the foregoing answer are true.

CHAS. W. HAGUE

Subscribed and sworn to before me this 26th day of May, 1939.

[Seal] KATE ORD NELSON
Notary Public in and for the County of Santa Barbara, State of California

My Commission Expires February 5, 1941 [64]

Service of the within Answer to Petition for Order Vacating Adjudication for Bankruptcy, by receipt of a copy thereof, is hereby admitted this 26th day of May, 1939.

EDWARD GALLAUDET and
T. H. CANFIELD
Attorney for J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson, Petitioners.

[Endorsed]: Filed Jun. 5, 1939. [65]

In the District Court of the United States
Southern District of California
Central Division

No. 31965-C. Bkcy.

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA BARBARA, a corporation,

Bankrupt.

MEMORANDUM OF ORDER

Cosgrave, District Judge.

The petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors filed on May 23, 1939, is granted.

The petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson for order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter is denied, and the motion of George Giovanola as Trustee in Bankruptcy to dismiss the said petition is granted on all the grounds set forth in the motion of the said Trustee to dismiss.

June 27, 1939.

[Endorsed]: Filed Jun. 27, 1939. [67]

In the District Court of the United States
Southern District of California
Central Division

No. 31965-C

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA BARBARA, a corporation,

Bankrupt.

ORDER DENYING PETITION TO VACATE ORDER OF ADJUDICATION

The petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter coming on regularly for hearing before the Honorable G. Cosgrave, Judge of the above-entitled Court on the 29th day of May, 1939, T. H. Canfield appearing as attorney for said petitioners, and W. P. Butcher appearing as attorney for George Giovanola as trustee in bankruptcy in the above-entitled matter and moving to dismiss said petition of said petitioners, said cause was argued and submitted to the Court for its consideration and decision and the Court being fully advised in the premises does now hereby

Ordered that the petition of said J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson for an order vacating the adjudication in

bankruptcy heretofore entered in the above-entitled matter be and the same is hereby denied and the motion of George Giovanola as trustee in bankruptcy to dismiss said petition be and the same is hereby granted on all the grounds set forth in the motion of said trustee to dismiss.

Dated this July 13, 1939.

GEO. COSGRAVE
District Judge

[Endorsed]: Filed Jul. 14, 1939. [68]

In the District Court of the United States
Southern District of California
Central Division

No. 31965-C

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA BARBARA, a corporation,

Bankrupt.

ORDER ALLOWING INTERVENTION OF CREDITORS

Upon the petition of Thomas J. Smitheram, J. F. Goux and E. W. Squier for leave to intervene in the above-entitled matter as petitioning creditors filed on May 23rd, 1939, duly verified and upon proceedings heretofore had herein and upon motion of W.

P. Butcher, Esq., attorney for said petitioners it is hereby

Ordered that the said petitioners be and they are hereby allowed to intervene herein and are hereby joined as intervening petitioning creditors in the petition in involuntary bankruptcy heretofore filed herein.

Dated this July 13, 1939.

GEO. COSGRAVE
District Judge

[Endorsed]: Jul. 14, 1939. [69]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that J. H. McCune and Alice W. Jackson, creditors of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, and Fred D. Jackson and Alice P. Jackson, stockholders of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from:

(1) The order of the above entitled Court denying the petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of George Giovanola, as Trustee in Bankruptcy, to dismiss the

said petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939.

(2) From the written "Order Denying Petition to Vacate Order of Adjudication", and the whole thereof, made and filed in the above entitled matter on July 14, 1939. [70]

Dated this 24th day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants.

Address:

Room 222 La Arcada Building,
Santa Barbara, California.

[Endorsed]: Copy mailed July 28, 1939, to W. P. Butcher, 1010 State Street, Santa Barbara, Cal.; W. P. Butcher and Stanley Tomlinson, 1010 State Street, Santa Barbara, Cal., and Heaney, Price, Postel & Parma, 21 E. Canon Perdido Street, Santa Barbara, Cal. Cost bond $250.00 filed.

R. S. ZIMMERMAN,

Clerk.

By E. L. S.

[Endorsed]: Filed Jul. 26, 1939. [71]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable George Cosgrave, Judge of the United States District Court for the Southern District of California, Central Division:

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, conceiving themselves aggrieved by the order of the above entitled Court denying their petition for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of George Giovanola, as Trustee in Bankruptcy, to dismiss their petition for an order vacating the adjudication in bankruptcy, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939, and which said order was signed and filed in writing on July 14, 1939, do hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that their appeal may be allowed and a citation granted, directed to First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson, Catherine Davidson, and George Giovanola, as Trustee in Bankruptcy, commanding them and each of them to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and [72] evidence in said proceeding, duly authenti-

cated, may be transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 24 day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson.

The foregoing appeal is hereby allowed.

Dated this 26 day of July, 1939.

WM. P. JAMES

Judge of the above entitled Court, signing in lieu of Judge Cosgrave who is absent from the district.

[Endorsed]: Filed Jul. 26, 1939. [73]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, appellants herein, and file the following assignment of errors on appeal from the order of the above entitled Court denying their petition for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of George Giovanola, as Trustee in Bankruptcy, to dismiss their petition for an order vacating the said adjudication in bankruptcy, which order was heretofore entered in the above entitled matter in Volume 6 of Minutes of the above entitled Court at pages 448 and 449, on June 27, 1939,

and signed and filed in writing in the above entitled matter on July 14, 1939:

The United States District Court for the Southern District of California, Central Division, erred in denying the said petition of the appellants for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of the said George Giovanola, as Trustee in Bankruptcy, dismissing the said petition of the appellants, in that:

(1) The original involuntary petition in bankruptcy filed in the within proceeding, upon which the said involuntary adjudication in bankruptcy was based, was insufficient on its face [74] to give the above entitled Court any jurisdiction on the proceeding.

(2) The original involuntary petition in bankruptcy shows on its face that two of the petitioning creditors thereunder did not have provable claims in bankruptcy.

(3) The above entitled Court should not have refused permission to the appellants to introduce evidence in support of their petition.

(4) The original adjudication of bankruptcy in the within proceeding is void and in excess of the jurisdiction of the above entitled Court.

Wherefore, appellants pray that said order may be reversed.

T. H. CANFIELD.

Attorney for J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson.

[Endorsed]: Filed Jul. 26, 1939. [75]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, present herewith this "Statement of Points on Appeal" in connection with the appeal from the order of the above entitled Court denying the petition for order vacating the adjudication in bankruptcy and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the said petition for order vacating adjudication in bankruptcy, and respectfully submit the following:

I

It is necessary that each creditor joining in an involuntary petition in bankruptcy be the owner of a demand or claim provable against the bankrupt within the provisions of the Bankruptcy Act. The existence of provable claims to the requisite amount is jurisdictional in an involuntary proceeding, and if such jurisdictional defect appears on the face of the record, the Court acquires no jurisdiction and any adjudication thereunder is void.

In the instant case, it appears from the face of the involuntary petition in bankruptcy, upon which the adjudication of involuntary bankruptcy was made, that the claims of two of the petitioning creditors are not provable claims in bankruptcy. [76]

II

Two of the three claims set forth in the original involuntary petition in bankruptcy do not repre-

sent provable claims in bankruptcy within the provisions of the Bankruptcy Act, in that such said two claims represent claims of stockholders of the bankrupt corporation, which claims are based upon the purported subrogation of such said stockholders to a portion of certain general claims against the bankrupt corporation. This purported subrogation arises from payments by such said stockholders of their proportionate share of stockholders' liability for payment of general claims against the bankrupt corporation. Such two claims are in effect portions only of general claims against the bankrupt corporation, such said petitioning creditors having been subrogated only to a portion of such said general claims. One who becomes subrogated only to a portion of a creditor's claim, has not a provable claim in bankruptcy, unless such creditor fails or refuses to prove the entire claim, in which event the subrogated party may prove the claim in the name of the original creditor.

III

Section 322a of the Civil Code of the State of California, under the authority of which said Code Section two of the original petitioners in the involuntary petition in bankruptcy base their claim, is unconstitutional insofar as it purports to allow partial subrogation, in that it infringes upon and impairs rights which had vested at the time of its enactment, and in that it is violative of the due process clauses and of the contract and ex post

facto clauses of the Constitution of the United States and the State of California.

Dated this 31st day of July, 1939.

T. H. CANFIELD.

Attorney for Appellants. [77]

Receipt of a copy of the above "Statement of Points on Appeal" is hereby admitted this 31st day of July, 1939.

JOHN WILLIAM HEANEY,
FRANCIS PRICE,
A. C. POSTEL &
HAROLD A. PARMA,
By WARNER EDMONDS, JR.

Attorneys for Appellees, First National Trust & Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson.

W. P. BUTCHER

Attorney for Appellee, George Giovanola, Trustee in Bankruptcy.

[Endorsed]: Filed Aug. 2, 1939 [78]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that J. H. McCune and Alice W. Jackson, creditors of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, and Fred D. Jackson and Alice P. Jackson, stockhold-

ers of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from:

(1) The order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, and the whole of such said order, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939.

(2) The written "Order Allowing Intervention of Creditors", which was made and filed in the above entitled matter on July 14, 1939.

Dated this 24th day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants.

Address:

Room 222 La Arcada Bldg.,

Santa Barbara, California.

Copy mailed July 28, 1939, to W. P. Butcher; W. P. Butcher and Stanley Tomlinson; and Heaney, Price, Postel & Parma. Cost bond $250.00 filed.

R. S. ZIMMERMAN, Clerk

By E. L. S.

[Endorsed]: Filed Jul. 26, 1939. [79]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable George Cosgrave, Judge of the United States District Court for the Southern District of California, Central Division:

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, conceiving themselves aggrieved by the order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449 on June 27, 1939, which said order was made and filed in written form in the above entitled matter on July 14, 1939, do hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that their appeal may be allowed and a citation granted, directed to Thomas J. Smitheram, E. W. Squier, and J. F. Goux commanding them and each of them to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings, and evidence in said proceeding, duly authenticated, may be transmitted to the [80] United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24th day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson.

The foregoing appeal is hereby allowed.

Dated this 26 day of July, 1939.

WM. P. JAMES

Judge of the above entitled Court, signing for Judge Cosgrave who is absent from the district.

[Endorsed]: Filed Jul. 26, 1939. [81]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now come J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, by and through T. H. Canfield their attorney, and file the following assignment of errors on appeal from the order of this Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939, and which said written order was signed and filed in the above entitled matter on July 14, 1939:

The United States District Court for the Southern District of California, Central Division, erred

in granting the petition of the said Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors in that:

1.—There had been an adjudication in bankruptcy on an involuntary petition in bankruptcy originally filed in the above entitled matter, which said involuntary adjudication in bankruptcy had not been vacated prior to the order of the Court allowing such intervention. [82]

2—The involuntary petition in bankruptcy originally filed in the said proceeding, upon which the involuntary adjudication in bankruptcy was had, is insufficient on its face to give the above entitled Court any jurisdiction of the proceeding.

3—The issues of fact raised by the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter, and the "Answer to Petition of Intervening Creditors" filed on behalf of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, have not been determined, and no evidence was offered or received in support of the said petition for leave to intervene.

4—That the said petition for leave to intervene fails to state or set forth sufficient facts upon which the relief requested may be granted, and fails to state sufficient facts to establish that the petitioners therein have provable claims in bankruptcy or are entitled to intervene in the bankruptcy proceeding.

Wherefore, the appellants pray that the said order may be reversed.

T. H. CANFIELD.

Attorney for J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson.

[Endorsed]: Filed Jul. 26, 1939. [83]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, present herewith this "Statement of Points on Appeal" in connection with the appeal from the order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, and respectfully submit the following:

I

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy after an involuntary adjudication in bankruptcy has been made and entered.

II

The original petition in involuntary bankruptcy filed herein, upon which the involuntary adjudication of bankruptcy was made, was insufficient on

its face to give the Court any jurisdiction in the bankruptcy proceeding, by reason of the fact that it appears from the face of such said involuntary petition in bankruptcy that two of the petitioning creditors did not have provable claims in bankruptcy. [84]

III

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy if the original involuntary petition is not sufficient on its face to give the Court jurisdiction to make the adjudication.

IV

The petition of the intervening creditors fails to state or set forth sufficient facts upon which an intervention could be granted, and fails to state sufficient facts to establish that the petitioners therein have provable claims in bankruptcy or are entitled to intervene in the bankruptcy proceeding.

V

The issues of fact raised by the petition of the intervening creditors for leave to intervene in the bankruptcy proceeding, and the Answer to Petition of Intervening Creditors filed on behalf of the Appellants, were not determined by the District Court, and no evidence having been offered or received in support of the petition for leave to intervene, the petition should not have been granted.

Dated this 31st day of July, 1939.

T. H. CANFIELD,
Attorney for Appellants.

Receipt of a copy of the above "Statement of Points on Appeal" is hereby admitted this 31st day of July, 1939.

W. P. BUTCHER &
STANLEY T. TOMLINSON
Attorneys for Appellees.

By S. T. T.

[Endorsed]: Filed Aug. 2, 1939. [85]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, appellants herein, do hereby designate the following documents to be contained in the record on appeal herein in the matter of the appeal from the order of the above entitled Court denying the petition of the appellants for an order vacating the adjudication in bankruptcy heretofore entered, and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the said petition of the appellants for an order vacating the adjudication in ruptcy:

1—Original petition in involuntary bankruptcy filed herein by First National Trust and Savings

Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson.

2—Original adjudication in involuntary bankruptcy.

3—Petition for order vacating adjudication in bankruptcy, and order to show cause issued thereon.

4—Answer to petition for order vacating adjudication for bankruptcy.

5—Motion to dismiss petition for an order vacating adjudication.

6—Transcript of the proceeding on the hearing of the [86] petition for order vacating adjudication in bankruptcy.

7—Minute order of the Court denying the petition for an order vacating the adjudication in bankruptcy and granting motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition for an order vacating the adjudication in bankruptcy, which minute order is entered in Volume 6 of Minutes, at pages 448 and 449.

8—Written order denying petition to vacate order of adjudication.

9—Notice of Appeal.

10—Petition for Appeal.

11—Assignment of Errors.

12—Citation.

13—Designation of Record on Appeal.

14—Statement of Points on Appeal.

Dated this 31st day of July, 1939.

T. H. CANFIELD,

Attorney for the Appellants.

Receipt of a copy of the above "Designation of Record on Appeal" is hereby admitted this 31st day of July, 1939.

JOHN WILLIAM HEANEY,
FRANCIS PRICE,
A. C. POSTEL &
HAROLD PARMA,
By WARNER EDMONDS, JR.

Attorneys for Appellees, First National Trust & Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson.

W. P. BUTCHER

Attorney for George Giovanola, Trustee in Bankruptcy, Appellee.

[Endorsed]: Filed Aug. 2, 1939. [87]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, do hereby designate the following documents to be contained in the record on appeal herein in the matter of the appeal from the order of the above entitled Court allowing the intervention of Thomas J. Smitheram, E. W. Squier, and J. F. Goux as petitioning creditors:

1—Original petition in involuntary bankruptcy filed herein by First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson.

2—Original adjudication in involuntary bankruptcy.

3—Petition of intervening creditors and order to show cause issued thereon.

4—Answer to petition of intervening creditors.

5—Transcript of the proceeding on the hearing of the said petition of intervening creditors on May 29, 1939.

6—Minute order of the above entitled Court granting the petition for leave to intervene, which minute order is entered in Volume 6 of Minutes of the above entitled Court, at pages 448 [88] and 449.

7—Written Order Allowing Intervention of Creditors.

8—Notice of Appeal.

9—Petition for Appeal.

10—Assignment of Errors.

11—Citation.

12—Designation of Record on Appeal.

13—Statement of Points on Appeal.

Dated this 31st day of July, 1939.

T. H. CANFIELD

Attorney for Appellants.

Receipt of a copy of the above "Designation of Record on Appeal" is hereby admitted this 31st day of July, 1939.

W. P. BUTCHER &
STANLEY T. TOMLINSON

Attorneys for Appellees.

By S. T. T.

[Endorsed]: Filed Aug. 2, 1939. [89]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages numbered from 1 to 89 inclusive, contain the Original Citations, a full, true and correct copy of Involuntary Petition; Adjudication and Order of Reference; Petition to Vacate Adjudication; Order to Show Cause; Petition of Creditors to Intervene with Exhibits A and B; Order to Show Cause; Motion of Trustee to Dismiss Petition; Answer to Petition in Intervention; Answer of Petitioning Creditors to Petition; Memorandum of Decision; Order Denying Petition to Vacate Adjudication; Order Allowing Intervention of Creditors; Two Notices of Appeal; Two Petitions for Appeal and Orders thereon; Two Assignments of Error; Two Statements of Points on Appeal; Two Designations of Contents of Record, which together with the Original Reporter's Transcript of Proceedings transmitted herewith constitute the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to $12.95 and that said amount has been paid me by the Appellants herein.

In testimony whereof, I have hereunto set my

hand and affixed the Seal of the said Court this 22 day of August, A. D. 1939.

[Seal] R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH

Deputy Clerk. [90]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING ON PETITION OF J. H. McCUNE, ET AL., FOR ORDER VACATING ADJUDICATION IN BANKRUPTCY, ETC.

(Testimony)

Appearances:

T. H. Canfield, Esq., and Edward Gallaudet, Esq., For Petitioners.

William P. Butcher, Esq., Warner Edmonds, Esq., and Stanley T. Tomlinson, Esq., For Respondents. [92]

Los Angeles, California,
Monday, May 29, 1939, 10:00 A. M.

Mr. Canfield: May it please the court, this matter——

The Court: Just a moment. In this matter an involuntary petition was filed against Mortgage Securities, Inc., showing the required jurisdictional facts. Service was made on the president of that company, default made, and an order of adjudication followed in May or June of 1928?

Mr. Canfield: That is correct, your Honor, except that we take exception to any contention that the jurisdictional facts appeared in the petition. Our position is that the jurisdictional facts do not appear in the original petition for the adjudication.

The Court: Then the first meeting was held and the trustee appointed?

Mr. Canfield: That is correct, your Honor.

The Court: And just what took place after that?

Mr. Canfield: The trustee was appointed, if the court please.

The Court: Yes. At any rate, your petition now is to set aside the order of adjudication filed a little before a year after the order had been made?

Mr. Canfield: The original adjudication, I believe, was made approximately June 1, 1938, if the court please, and this petition to vacate the order on the ground of lack of jurisdiction was filed in less than a year. I can give [93] you the exact date. It was the 20th day of April, 1939.

The Court: Now, what do you claim to be the lack of jurisdictional facts?

Mr. Canfield: The lack of jurisdictional facts, in the opinion of the petitioner, your Honor, is the contention that the complaint or the petition for the original adjudication in bankruptcy does not set forth claims of three creditors who have provable claims in bankruptcy, that it purports to set forth three creditors' claims totaling more than $500, but that, on the face of the petition, two of

those claims are subrogated claims which have no standing as provable claims in bankruptcy, and therefore are not provable claims, and cannot be made the subject of an involuntary petition in bankruptcy.

Following that line of reasoning, it is the position of the petitioners that, there being a defect upon the face of the petition, the court did not acquire jurisdiction, and therefore the original adjudication in bankruptcy is void and annullable.

The Court: Now, you allege lack of jurisdiction. Was one creditor qualified?

Mr. Canfield: Yes, there is one creditor who is qualified.

The Court: And the other two were creditors because they deemed themselves creditors under the stockholders liability statute? [94]

Mr. Canfield: That is correct, having paid a portion of one qualified claim and another claim which is not involved in this proceeding.

The Court: At any rate, of the debtor company?

Mr. Canfield: That is correct, your Honor.

The Court: Now, your point is that by reason either of the repeal of that statute or it having been declared invalid—repealed, wasn't it?

Mr. Canfield: The statute was repealed, your Honor, but that has no effect on this particular proceeding.

The Court: Why not?

Mr. Canfield: Our point is that the enactment of Section 322a after the repeal gave the first right of

subrogation, and that as to creditors that section is unconstitutional. In other words, it splits up the creditors' claims and makes numerous claims, and therefore those subrogated claims, under the statute and the Bankruptcy Act, do not constitute provable claims in bankruptcy.

The Court: A subrogated claim does not constitute a provable claim?

Mr. Canfield: That is our position, unless the entire amount has been paid by the creditor who has been subrogated. In the case of a subrogation, whether it be a subrogation under the statute or a subrogation in an instance of principal and surety, that if the surety, for instance, pays only a portion of the principal claim, he thereupon, in [95] equity, becomes subrogated to a portion of that claim, but he cannot himself prove that claim in bankruptcy. He must first obtain all of the claim before a subrogated creditor can come in and claim any portion of any dividend.

The Court: You had better illustrate your position.

Mr. Canfield: For instance, your Honor, in the case of principal and surety, if the surety company signs a bond for a principal, he becomes subrogated under the bond to pay a portion of the claim against that principal.

The Court: To pay a portion?

Mr. Canfield: Yes. In many cases the surety is only bound up to a certain amount. He becomes, then, liable to pay a portion of that claim, and he

thereupon becomes subrogated, under the contract with the principal and under equitable principles, to a portion of the creditor's claim which he has paid. Is that clear, your Honor?

The Court: Yes.

Mr. Canfield: So that we would have a creditor with a claim against a principal, a portion of that creditor's claim having been paid by the surety, and the surety having become subrogated only to that portion of the creditor's claim, split into two parts.

Our position, under the law and the cases, and which we are, I believe, able to substantiate, is that that surety, owning only a portion of that creditor's claim, cannot come into a bankruptcy court and prove that claim until, if and [96] when the original principal creditor refuses to do so. The Bankruptcy Act so provides in so many words, and therefore we claim that anyone who becomes subrogated by contract or by statute to a portion of a creditor's claim only, has not a provable claim in bankruptcy upon which he may file an involuntary petition in bankruptcy, or upon which he may file a claim which is provable before a referee in bankruptcy.

The Court: Now, applying your statement to the facts in the case, one of the claimants is a bank?

Mr. Canfield: Mortgages Securities owes the First National Bank of Santa Barbara $50,000, and the First National Bank thereupon became a

creditor of Mortgage Securities. The First National Bank brought actions against the stockholders of Mortgage Securities under the old stockholders' liability of California, and forced Peter Davidson and Horace P. Hoefer to pay their stockholders' liability to the First National Bank. The legislature of California enacted Section 322a, which provides that in the event of payment by a stockholder to a creditor of a debtor, that stockholder becomes subrogated to that portion of the creditor's claim which he has paid. In this instance, Peter Davidson having paid a portion of the First National Bank claim, became, under Section 322a, subrogated to a portion of the First National Bank claim, so that, instead of having one claim against Mortgage [97] Securities, the original claim of First National Bank for $50,000, we now have three claims, the claim of First National Bank of Santa Barbara against Mortgage Securities for the balance of its claim, the claim of Peter Davidson, after being subrogated to a portion of that claim, and the claim of Horace P. Hoefer, after having been subrogated to a portion of that claim. We have, then, in effect, instead of one original claim provable in bankruptcy, three split claims.

The Court: Let me interrupt you there.

Mr. Canfield: Yes.

The Court: Did the bank state its claim on the entire amount, or for the unpaid portion?

Mr. Canfield: In the original petition, your Honor?

The Court: Yes.

Mr. Canfield: It is my understanding that it was only upon the portion unpaid. Is that correct, Mr. Edmonds?

Mr. Edmonds: I believe so. But I believe the claim on file is only for the part due.

Mr. Canfield: The Judge means whether the original petition in bankruptcy——

The Court: Suppose the original total was $50,000 and two stockholders each paid $5,000, and there was a balance of $40,000. Was that made the subject of the bank's claim?

Mr. Edmonds: I believe the petition just sets up the [98] total amount and states that certain payments have been made. The amounts of those payments are not alleged in the petition.

The Court: I understand. But what I want to get clear on is the amount of the claim of the bank. Is that the balance remaining after these payments, among others, perhaps, have been credited?

Mr. Edmonds: That is correct.

Mr. Canfield: Not in the original petition. In a claim which has been subsequently filed with the Referee that is true; not as to the original petition.

The Court: Then what is the amount of the bank's claim in the original petition?

Mr. Canfield: I am speaking now only from what counsel has just told me. The amount of the claim set forth in the original petition, your Honor, is simply an allegation that the First National Bank

is the owner of all of these promissory notes, setting forth the face amounts thereof.

The Court: Does it give the total amount of the claims?

Mr. Canfield: It lists about five notes, and says that no part of them has been paid. It lists the entire face amount of the original notes.

The Court: So that the claim of the other two creditors is a duplication?

Mr. Canfield: That is correct, your Honor.

Mr. Edmonds: May I be heard for one moment on that, [99] your Honor?

The Court: You will have plenty of time.

Mr. Canfield: The exact allegation in the original complaint is this, your Honor, that after setting forth the original notes and their original amounts and the interest thereon, the allegation is this:

> "That an action was commenced in the Superior Court of the State of California, in and for the County of Santa Barbara, on July 9, 1935, to recover the amount due on said notes; that said action is still pending and said notes have not been paid."

The subsequent allegation sets forth the subrogated claims which are attempted to be made the basis for this petition, the two subrogated claims.

The Court: They allege payment to the bank?

Mr. Canfield: They allege a payment to creditors generally, I believe. I do not believe they allege direct payment to the bank.

The Court: Well, that is the basis for your motion?

Mr. Canfield: That is, in substance, the principal basis for our motion. The point of law which will be primarily before the court is that the court must determine its jurisdiction to make the adjudication. The question as to whether or not Section 322a is constitutional as against creditors—our Appellate Court, by the way, has adjudicated it constitutional as against the corporation [100] itself—and the next point will be——

The Court: Let me interrupt you again. Does Section 322a refer to the payment on account of stockholders' liability?

Mr. Canfield: Yes, your Honor. It was put into the statute, your Honor, to take care of the case where creditors had to pay, and to give them some recourse against the corporation.

The second point that the court will be obliged to determine is this, that if Section 322a is constitutional, so as to give creditors a right of subrogation, then as to whether or not those subrogated claims are provable in bankruptcy. We have numerous cases on that, which we have submitted in our memorandum of points and authorities, to the effect that a subrogated claim is not a provable claim in bankruptcy until, if and when the party has paid the entire claim.

The Court: You have supported your petition, I suppose, with suitable authorities?

Mr. Canfield: I have supported the petition with a very complete memorandum of points and authorities, your Honor. There has been no compliance with the court rule that an answering memorandum be filed within five days. There is not at this time any memorandum of points and authorities, any answering memorandum, so we are in the dark as to the position taken by the respondent. [101]

The Court: Who is the respondent?

Mr. Canfield: The respondents are the original petitioning creditors, the Mortgage Securities, Inc., of Santa Barbara, and possibly—we do not admit this—but possibly the Trustee in Bankruptcy. I may state, your Honor, that at this time we have three motions before the court. In addition to my motion to dismiss, which has been properly noticed and which is supported by proper points and authorities, we have a petition by three other creditors of Mortgage Securities to join in the original petition. That petition is also before the court this morning on an order to show cause. To that petition we have filed an answer setting forth some special defenses, which too will be argued at this time. In addition to that, there is, on behalf of the Trustee in Bankruptcy, what purports to be a motion to dismiss our petition. That is not noticed, nor has it been set for hearing, nor was the statutory notice given, but, representing the petitioners here, we want the matter heard, and we do stipulate at this time that it may be heard at this time

and waive all notice or other jurisdictional requirements and request that that be heard in conjunction with these other motions. These three matters are before the court at this time, and I am ready to proceed on any of those matters that the court desires.

The Court: Let me hear from the proposed interveners.

Mr. Canfield: And we have interposed to this petition [102] what is in effect a demurrer or motion to strike, set out in the answer, challenging the right of the court to hear that petition to intervene, and possibly we should be heard upon that demurrer or motion to strike.

The Court: Possibly the court had better know what it is first.

Mr. Butcher: Now, if the court please,——

The Court: You are representing the proposed intervenors?

Mr. Butcher: I represent the Trustee in Bankruptcy, and also the proposed intervenors, with Mr. Stanley Tomlinson, who is associated with me, representing the proposed intervenors. We have filed an objection to the original petition, if the court please, and if I may be heard on that——

The Court: I think you had better be heard on whether the proposed intervenors have a right to be heard at this stage or whether they have a right to intervene.

Mr. Butcher: Of course, these creditors are not conceding that the original involuntary petition in

bankruptcy, if the court please, is defective for want of jurisdiction of this court. It is our contention that the creditors who signed the original petition, so-called subrogated creditors, are not in fact subrogated creditors, but have a direct statutory right to file their action against the bankrupt, and that right is founded purely and simply upon statute, and that it is not in the nature of a subrogation, [103] because it was not recognized as a right prior to the enactment of the statute, for a creditor, after paying his proportionate share, to thereupon file suit for his proportionate share that he paid. That right did not exist before, but was given to him by statute. Therefore what I am about to say is not a concession on the part of the Trustee or the creditors that there is any defect in the original petition, but if your Honor should so rule, these creditors still feel that the assets of the bankrupt should be marketed and collected, and that the suit that is now pending should be proceeded with by the Trustee, and that their interests should be protected. These creditors claim that they have a right to supplement the original petition, upon the ground that they have provable claims. The first claim is the claim of E. W. Squier and J. F. Goux, who have filed a claim in bankruptcy for attorney fees in representing the bankrupt. The other claim is the claim of Thomas J. Smitheram, which is annexed to the petition, representing money paid in to the bankrupt for a certificate for one of the se-

curities which the bankrupt was issuing, and which was never issued.

The Court: You are speaking now of the claims of the proposed intervenors?

Mr. Butcher: That is correct. They are not founded upon any stockholder's liability. They are founded upon a contract, express or implied. [104]

The Court: Is the position that counsel claims for his client conceded by you?

Mr. Canfield: If the court please, we concede the provability of the claim of Mr. Squier and Mr. Goux. We have filed an answer denying the existence of the second claim.

The Court: Then there is no need to argue further on the first.

Mr. Butcher: The second claim is attacked upon the ground that it is barred by the statute of limitations. It is our contention that the claim is still provable, and whether it is or is not barred comes up at the time we reach the allowance of claims. It does not affect the right to file a petition in involuntary bankruptcy. And I will file, if your Honor will permit me, authorities to that effect. So that the only ground upon which——

The Court: What do you say about that? Do you concede what he said?

Mr. Canfield: No, I do not, your Honor. It is our contention——

The Court: All right. I don't want a discussion of it. I merely wanted to know, to save time.

Mr. Canfield: May I proceed in answer to Mr. Butcher's petition in intervention, if he is through?

The Court: No. He is not through. You are representing two creditors whose position is conceded, I understand, [105] and one other whose position is not conceded?

Mr. Butcher: That is correct.

The Court: That is the stipulation. You got the cart before the horse. Sometimes we get confused. But have you a right to appear here and ask——

Mr. Butcher: The court has discretion——

The Court: Is that conceded by counsel?

Mr. Canfield: No, your Honor. Our position is directly contrary on that.

The Court: All right. I will hear from you on that.

Mr. Butcher: Your Honor must remember that the bankrupt was adjudged a bankrupt on the 1st day of June, 1938, a trustee was elected at a meeting called by the Referee in Bankruptcy at Santa Barbara, and it was not until the 20th day of April, 1939, that this question of the validity of the original adjudication was raised. We claim that if these other creditors have a right to object to the order of adjudication, that the whole issue is still open, and that at any time before the actual dismissal of the proceedings by the court, any other creditor may come in. I take it, your Honor, that there is no question that before adjudication is made a creditor may intervene.

Mr. Canfield: We do make a question as to that, your Honor?

Mr. Butcher: And I have authorities on that.

Mr. Canfield: I say, we do make a question as to that [106] right, your Honor.

The Court: The court will rule against you without hearing argument, because I have studied that thing to a very considerable extent, and it is a right of the creditor to intervene in a petition in bankruptcy.

Mr. Canfield: Our position is this, that in order to give that right the original petition must be sufficient on its face to give the court any jurisdiction.

The Court: I am with you on that proposition as to the right of the creditors other than the three named in the original petition to intervene.

Mr. Butcher: I am reading now from Remington on Bankruptcy, Volume 1, at page 344, in which I find this statement: "However, it is discretionary with the court to allow intervention even after order of adjudication or dismissal is entered."

I cited in my authorities here accompanying the motion to the petition that particular section and other authorities, among them In re Jutte, 258 Fed. 422.

Now, the Bankruptcy Act itself provides that the creditors may come in at any time, and any time has been construed, referring now to the——

The Court: What section of the Bankruptcy Act are you referring to?

Mr. Butcher: The Bankruptcy Act of 1898, Section 59, subdivision (f). [107]

The Court: Well, we must live in the present. What is it under the present act?

Mr. Butcher: I think that same wording is found in the present act, if the court please, under the same section. I might have gotten it wrong.

The Court: 58?

Mr. Butcher: Yes, if I am not mistaken.

The Court: What subdivision?

Mr. Butcher: Subdivision (f). I cited those authorities in this memorandum on the theory that they may join to supplement the original petition. Of course, the matter is thrown open by the petitioners here themselves. They are coming in to object to the order of adjudication. They are adverse petitioners. The other creditors who have rights in this matter certainly should be permitted —if there were at the time of the filing of the original petition actually enough provable claims, the court should not dismiss the bankruptcy proceeding, even though the order of adjudication in itself may be attacked, to defeat the right of creditors who had provable claims at the time of the filing of the original petition in bankruptcy. There was no attack made by the petitioning creditors at the time; they sat silently by, and now have come in here almost a year later. And that lulled these other creditors into a sense of security, in the belief that the proceedings were legal on their face, and until this

time they had a [108] right to assume that the Trustee who had been elected and appointed would carry out and perform his duties and liquidate the affairs of the bankrupt. That is the position we are in. We are put in this position by the laches and unreasonable delay of the very objectors themselves. They should not, under equity, be allowed to take advantage of that situation. If they had raised that point prior to adjudication, then the creditors, who might for the first time have knowledge of it, could have come in before the order of adjudication and at that time intervened.

The Court: You represent the proposed intervenor. What further appearances are there?

Mr. Butcher: I am appearing for the Trustee.

Mr. Edmonds: I am appearing, your Honor, on behalf of the original three petitioning creditors. First of all, if your Honor please, in connection with the statement heretofore discussed about what the original petition discloses with reference to whether or not the First National Bank of Santa Barbara had proved the right to claim that the petition does set up the correct amount of notes outstanding and alleges that they have not been paid. The petition of the two petitioning creditors Davidson and Hoefer is not that they have simply paid a portion of the claim of the First National Bank, but that they have paid in proportion to the other claims owing to other creditors of the bankrupt. Consequently, their entire claim is not based upon the fact [109] that they paid only the First National Trust and Savings Bank——

The Court: Have you the petition before you?

Mr. Edmonds: Yes. It alleges: "That your petitioners, Horace P. Hoefer, Peter Davidson and Catherine Davidson, are and each of them is a creditor of Mortgage Securities Inc. of Santa Barbara by reason of the following facts:

> "That at all times mentioned herein and prior to 1931 each of said petitioners was a stockholder of Mortgage Securities Inc. of Santa Barbara and as such stockholders were liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by each bore to the whole of the subscribed capital stock of said Mortgage Securities Inc. of Santa Barbara; that prior to the 15th day of October, 1936, certain creditors of Mortgage Securities Inc. of Santa Barbara made demand upon said petitioners for payment of each of said petitioner's indebtedness to said creditors by reason of such stockholders liability; that on October 15, 1936, your petitioner, Horace P. Hoefer, paid to said creditors the sum of $296.00 in satisfaction of his indebtedness to said creditors and by reason of such payment your petitioner, Horace P. Hoefer, has a provable claim against said Mortgage Securities Inc. of Santa Barbara in the sum of $296.00."

Then follow similar allegations as to the payment to the creditors by Peter Davidson and Catherine

Davidson. Their [110] claim is based entirely upon payment of stockholders liability.

The Court: On this note?

Mr. Edmonds: On that note and other notes to other creditors. My sole point at this moment is that they are not merely making claim by reason of payments which they made to the other creditors here, but to other creditors who do not appear as petitioners. It is our primary position in this matter, and we submit it appears from the points and authorities cited by the petitioners who are objecting and asking for a dismissal, that a subrogated stockholder has a direct and primary claim against the bankrupt. We believe that sufficiently follows from the authorities heretofore cited in the memorandum of points and authorities by Mr. Canfield. It is our position that Section 322a, which gives a right of subrogation, must be construed and become a part of any subscription contract, and that a promise will be implied from which a direct right of contribution arises, and that on that right of contribution there is a direct contract which makes those claims provable, in that they are different from the other claims. We have also set up in the answer to the objections which we have filed a purported defense based upon this theory, that if, and only if, the subrogated stockholders who appear here as petitioning creditors are held not to have provable claims, then and in that event all of the creditors who base [111] their claims on stockholders liability—and there are numerous ones of them

—do not likewise have provable claims, and if we eliminate those stockholders who paid their stockholders liability from consideration, then there are less than 12 creditors of Mortgage Securities, Inc. of Santa Barbara. And of course one petitioning creditor is necessary in the original petition, and that one creditor is admittedly the First National Trust and Savings Bank of Santa Barbara.

The Court: Is there anything in the pleadings from which the court will know that?

Mr. Edmonds: There is nothing in the original petition, for the obvious reason that was filed on the theory that three were necessary. However, I have set up in my answer filed on behalf of the petitioning creditors a statement to that effect.

The Court: Let me interrupt you here a moment. You mean to the effect that eliminating those who claim the character of creditors on account of stockholders liability rights, that that will throw the number of creditors below 12?

Mr. Edmonds: That is correct. And I have also prepared, and was going to ask leave of this court to file, an amendment to the original petition, to include such an allegation, an allegation that the creditors are less than 12, excluding subrogated stockholders. [112]

The Court: Leave to amend the original petition?

Mr. Edmonds: Leave to amend the original petition nunc pro tunc, as of the date it was filed.

The Court: Did you file the original petition?

Mr. Edmonds: I did.

The Court: Very well. Has everybody been heard from in this initial move? Then I will hear from you, Mr. Canfield.

Mr. Canfield: May it please the court, may I direct my answering argument first to the petition of the intervening creditors Squier, Goux and Smitheram. Those are the petitioning creditors who have now asked to come in and augment the original petition. Mr. Butcher argued that matter first.

The Court: I don't care for argument. If you want to make any suggestions in reply, you may do so. I would like to ask you this: I hear no objection on account of laches here; at least I didn't get it. But is it competent, or is it lawful, at the expiration of almost a year, to come in and ask that the adjudication be set aside?

Mr. Butcher: You are asking us generally on that subject?

The Court: No. I am asking Mr. Canfield what he thinks about that.

Mr. Canfield: We are prepared to meet that point, your Honor. Would your Honor like me to argue that point [113] at the present time?

The Court: Yes. I wouldn't object to hearing from you on it.

Mr. Canfield: May it please the court, in numerous cases, cases almost without number, it has been held by various courts that a motion to vacate an adjudication in bankruptcy must be made promptly. We admit that a number of cases so hold. However, that rule is founded completly on the

doctrine of laches and estoppel in nearly every reported case. I say that, without qualification, where a petition to vacate has been denied by our appellate tribunals, or by any other tribunal, there has been some element of damage, some element of a change of condition, some element of acquiescence, or something of that order. I have a number of cases here on that point which I have prepared, and which I will be glad to submit to your Honor. However, I say in this particular instance, regardless of the question of laches, regardless of the question of estoppel, that this court must take cognizance of an objection to its own jurisdiction, must take cognizance of the question as to whether it ever acquired jurisdiction and whether we appear competently to present that fact, or whether it is pointed out to the court in some other manner. Two reported cases have directly held, while holding that the petitioner had no standing in court, that when the question of jurisdiction arises, when it becomes material to determine whether in [114] the first instance the court had jurisdiction, the court should and must of its own motion determine whether or not it still has any jurisdiction, by reason of the original jurisdictional defense. Our position is this, that if that orignial petition is not sufficient on its face, this court acquired absolutely no jurisdiction of the property, and, that being such a jurisdictional defect as would make all proceedings void, the court is obligated to take cognizance of that, whether or not the doctrine of laches exists. In the

second instance, if the court desires to determine on its merits the question of laches or estoppel, let me point this out, that the Mortgage Securities, Inc. of Santa Barbara was adjudicated bankrupt on or about June 1, 1938. All of these things appear in my petition, and no answer appears in answer thereto. On July 1st a trustee was appointed, and no other proceedings whatever or at all were had until what purported to be an adjourned creditors' meeting in February, at which time the people whom I represent, acting through counsel, appeared at that meeting and made the first objection I am making to your Honor at this time. We appeared at that February meeting after we obtained knowledge of these facts and objected to the jurisdiction of the court, and notified the Trustee and Referee and parties present, that we would file, when we had it properly prepared, in this court a motion to vacate. A subsequent meeting was had about three weeks later, at [115] which time we again appeared and made a similar objection, pointing out the deficiency in the original petition, and notified the Referee and Trustee and creditors present at that time that we would prepare and file a motion to vacate. If the court please, during all this time the Trustee in Bankruptcy has had possession of the assets of the Mortgage Company, and he has done nothing to administer the estate. No positions have been changed; no one has suffered; there has been no damage, no element of acquiescence in these proceedings, with the exception that we did, for the

petitioning creditors here, file a claim in the bankruptcy matter. We therefore state that, having given notice to this court at that first meeting, that that doctrine does not apply, and we desire to submit authorities on it.

The Court: Is the Mortgage Securities bankrupt?

Mr. Canfield: That, if the court please, would be a matter of proof.

The Court: I know. But are they in business?

Mr. Canfield: No.

The Court: What is the fact?

Mr. Canfield: They are not in business. They depend entirely, if the court please, upon liquidation of a number of assets which are in the hands of the Trustee.

The Court: They are not in business at the present time?

Mr. Canfield: They are not doing business, no. [116] The corporation is still in existence, but it is not doing business.

The Court: If the adjudication is set aside, what is going to happen?

Mr. Canfield: These petitioning creditors have a right, in the event this court holds that the original petition is sufficient, to join with the original creditors and have a valid adjudication. However, I would like to suggest this, that the law is well founded, regardless of the authorities cited by those petitioners, that a creditor cannot intervene after adjudication. The Supreme Court of the United

States determined that point in the case of Canute Steamship Co. v. Pittsburgh and West Virginia Coal Co., in 1923, long subsequent to the authorities cited by the petitioners.

The Court: You cite that in your memorandum?

Mr. Canfield: Yes, I do, your Honor. The cases cited by the petitioner are directly in point with our contention, and hold directly that the court has the power before adjudication and before dismissal to allow an intervention, but not afterwards.

In addition to that, we have one other point, your Honor, and that is this, that, irrespective of the matter of adjudication, we submit to the court that creditors have no right to intervene at any time unless the original petition gives the court jurisdiction. The court cannot cure a jurisdictional defect. So we are right back to our [117] original point, as to whether or not that original petition sets forth creditor claims. I have authorities, and will be glad to set them out, on that point, the point that no intervention may be permitted unless the original petition is sufficient on its face.

The Court: You may do that. I want to consider all the authorities. Let the matter stand submitted, then. It had better stand submitted in the usual way, I mean to say, follow the usual course. After the filing of all the authorities, let it stand submitted. That is to say, the proposed intervenors come in at this time and file their authorities in support of their contention and you later reply to that. Within how much time?

Mr. Canfield: They have already filed their points in support of the petition. And I have filed my points, and it may stand submitted at this time.

The Court: Do you want to file a reply to that?

Mr. Butcher: Yes, I would like to reply.

The Court: You may reply to his authorities.

Mr. Butcher: I would like also to be heard on the merits of this petition, but I don't want to have to take any more time of the court on that unless your Honor desires argument. But the thing I want to stress in behalf of the Trustee, who moved to dismiss their proceedings, is the fact that these claims of these stockholders are a direct claim against the company, and they are not subrogated [118] creditors. I want to point out that counsel made the statement that the Trustee has done nothing. We have filed an account involving hundreds of thousands of dollars of claims against one of his clients.

The Court: I guess I know about what the situation is. Then, those authorities being filed, the matter will stand submitted.

Mr. Butcher: Yes. Is that as to all these matters, your Honor?

The Court: That is all now.

Mr. Canfield: I might state to the court this proposition, which I have not had an opportunity to state on the motion of the Trustee to dismiss our petition. Our position is that the Trustee has no standing in court for that purpose. The Trustee is an officer of this court and has no standing to come

before the court and ask to dismiss what is merely a petition calling the court's attention to the matter of jurisdiction. We submit a motion to dismiss will not lie in a matter of this kind, merely bringing before the court what is already before the court.

In addition to that, your Honor, inasmuch as the answer filed by the original creditors to my petition raises only two issues of fact, one of which we concede at this time, I have prepared and ask leave to file at this time two affidavits in support of our original petition, only on the points that are at issue. [119]

The Court: Very well. You can file them. If the Trustee has no right, whose business is it to oppose this motion?

Mr. Canfield: The Mortgage Securities Inc. of Santa Barbara is the bankrupt, and we have given due and proper and legal notice to all the original petitioning creditors, under the Bankruptcy Act and under the order of this court, your Honor.

The Court: Of course, the Trustee, assuming a proper adjudication, represents both the debtor and the creditors.

Mr. Canfield: That is assuming proper adjudication.

The Court: That is what I am saying. So the sole question is the question of jurisdiction?

Mr. Canfield: That is correct, your Honor.

Mr. Tomlinson: I am associated, in the first place, with Mr. Butcher, in behalf of the three intervening creditors, and, second, I represent cer-

tain other stockholder creditors, about 12 in all, who were served with the order to show cause, generally, as creditors. They were served as a class, isn't that correct, Mr. Canfield?

Mr. Canfield: No.

Mr. Tomlinson: Creditors who had filed claims?

Mr. Canfield: We served only the creditors who had filed claims.

The Court: That is, stockholders liability?

Mr. Tomlinson: All of my other clients are stock- [120] holders claimants.

The Court: Very well.

Mr. Edmonds: May I have the opportunity to answer the affidavits being filed by Mr. Canfield on the question of whether or not——

The Court: Mr. Canfield, what are those going to be?

Mr. Canfield: We have alleged in our petition as to the time we first obtained exact knowledge of the form of this original petition. We set forth in these affidavits the facts and circumstances, and that is the only issue.

The Court: Now, your president was served? The debtor's president?

Mr. Canfield: Yes, but the point is this——

The Court: You say you don't represent the debtor?

Mr. Canfield: No, I am not representing the Mortgage Company.

The Court: Who do you represent?

Mr. Canfield: I represent certain creditors of the Mortgage Company and two stockholders who

are appearing and moving to set aside this adjudication.

The Court: All right. The president of the Mortgage Company was served?

Mr. Canfield: No. I think it was the secretary, your Honor.

The Court: Well, anyway, the secretary is an officer. I am not going to go into why he didn't or consider why he [121] didn't answer, because Santa Barbara isn't the largest place in the world, and everybody knows what is going on up there, and you can't get any indulgence from the court by reason of the proposition of failure to understand what was being done.

Mr. Canfield: The court misconstrues my position. That wasn't my position. My position was that these creditors I represent and stockholders had no actual knowledge of the fact that the petition was deficient on its face until some months afterwards.

The Court: They were able to secure active counsel and intelligent counsel, apparently, so that is removed from the court's consideration.

Mr. Canfield: I have also an affidavit of myself, as your so-called intelligent counsel, stating when I first obtained any knowledge.

The Court: I don't want to pass upon the veracity of all the inhabitants of Santa Barbara before I get through this case, and no affidavits will be filed at all.

Mr. Canfield: Very well. Would it be of any convenience to your Honor to have a transcript of this argument? I am going to have it written up.

The Court: I think not.

Mr. Butcher: What time is allowed for filing my brief?

The Court: You will have whatever is usual, say, five days. [122]

Mr. Butcher: Very well.

Mr. Canfield: If the court please, if any new points are raised in this answering brief, I assume, by indulgence of the court and counsel, I will be allowed to answer?

The Court: Well, I cannot offer you very much hope. I am afraid that the matter has been sufficiently discussed, and it is not likely that counsel will try to take any unfair advantage of you in replying to your points.

Mr. Canfield: Very well, your Honor. [123]

I, C. W. McClain, do hereby certify that on the 29th day of May, 1939, I was a duly qualified and appointed official shorthand reporter of the United States District Court for the Southern District of California, Central Division, and that on said date I took down in shorthand writing the testimony and proceedings had and given in the matter of Mortgage Securities, Inc., of Santa Barbara, a corporation, bankrupt, No. 31963, Bankruptcy, before Hon. George Cosgrave, Judge of said court, and thereafter caused the same to be transcribed into typewriting.

I further certify that the foregoing pages, numbered from 1 to 32, both inclusive, contain a full, true and correct transcript of my shorthand notes taken as aforesaid on the above mentioned date.

Dated at Los Angeles, California, this 31st day of July, 1939.

C. W. McCLAIN,
Official Shorthand Reporter.

[Endorsed]: Filed Aug. 1, 1939. [124]

[Endorsed]: No. 9270. United States Circuit Court of Appeals for the Ninth Circuit. J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, Appellants, vs. First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson, Catherine Davidson, and George Giovanola, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a corporation, Bankrupt, Appellees, and J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, Appellants, vs. Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed August 23, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth *District*

No. 9270

In the matter of

MORTGAGE SECURITIES INC. OF SANTA BARBARA, a corporation,

Bankrupt.

J. H. McCUNE, ALICE W. JACKSON, FRED D. JACKSON, and ALICE P. JACKSON,

Appellants.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees.

J. H. McCUNE, ALICE W. JACKSON, FRED D. JACKSON, and ALICE P. JACKSON,

Appellants.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, and GEORGE GIOVANOLA, Trustee in Bankruptcy,

Appellees. [126]

STIPULATION FOR CONSOLIDATION OF RECORD ON APPEAL

It is hereby stipulated by and between J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, in the matter of the appeal of such said Appellants from the order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene herein, and from the order of the above entitled Court denying the petition of said Appellants for an order vacating the adjudication in bankruptcy herein and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss said petition for order vacating said adjudication, and First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson, Appellees, Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Appellees herein, George Giovanola, Trustee in Bankruptcy, Appellee herein, by and through their respective attorneys, as follows:

That the appeals hereinabove mentioned and the record on appeal in the matter of the said two appeals hereinabove mentioned, may be consolidated, and that said record on appeal as consolidated shall contain all portions of the record, proceedings, and evidence designated or to be designated to be included in the record on appeal in the instance of each of said appeals, but that all such portions [128] of the said record, proceedings, and evidence shall be included therein without duplication.

Dated this 18th day of August, 1939.

T. H. CANFIELD,
Attorney for Appellants.

JOHN WILLIAM HEANEY,
FRANCIS PRICE,
A. C. POSTEL,
HAROLD A. PARMA,
By WARNER EDMONDS, JR.,
Attorneys for First National Trust & Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson,
Appellees.

W. P. BUTCHER,
STANLEY TOMLINSON,
Attorneys for Thomas J. Smitheram, E. W. Squier and J. F. Goux, Appellees.

W. P. BUTCHER,
Attorney for George Giovanola, Trustee in Bankruptcy, Appellee.

[Endorsed]: Filed Aug. 22, 1939. Paul P. O'Brien, Clerk. [129]

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from proceedings of Friday, August 25, 1939.

Before: Mathews, Stephens and Healy, Circuit Judges.

[Title of cause.]

ORDER CONSOLIDATING APPEALS.

Upon consideration of stipulation of counsel for respective parties, and good cause therefor appearing, Ordered appeals in above cause consolidated in one transcript of record for hearing. [131]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL FROM ORDER DENYING PETITION FOR ORDER VACATING ADJUDICATION IN BANKRUPTCY AND DESIGNATION OF RECORD.

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants in the matter of the appeal from the order of the District Court of the United States, Southern District of California, Central Division, denying the petition for an order vacating the adjudication in bankruptcy and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the said petition for order vacating the adjudication in

bankruptcy, respectfully submits the following state- [133] ments of points on appeal and the designation of the record necessary for the consideration thereof.

STATEMENT OF POINTS ON APPEAL

I.

It is necessary that each creditor joining in an involuntary petition in bankruptcy be the owner of a demand or claim provable against the bankrupt within the provisions of the Bankruptcy Act. The existence of provable claims to the requisite amount is jurisdiction in an involuntary proceeding, and if such jurisdictional defect appears on the face of the record, the Court acquires no jurisdiction and any adjudication thereunder is void.

In the instant case it appears from the face of the involuntary petition in bankruptcy, upon which the adjudication of involuntary bankruptcy was made, that the claims of two of the petitioning creditors are not provable claims in bankruptcy. The District Court, therefore, committed error in denying the petition of the Appellants to vacate the original adjudication in bankruptcy.

II.

Two of the three claims set forth in the original involuntary petition in bankruptcy do not represent provable claims in bankruptcy within the provisions of the Bankruptcy Act, in that such said two claims represent claims of stockholders of the bankrupt

corporation, which claims are based [134] upon the purported subrogation of such said stockholders to a portion of certain general claims against the bankrupt corporation. This purported subrogation arises from payment by such said stockholders of their proportionate share of stockholders' liability for payment of general claims against the bankrupt corporation. Such two claims are in effect portions only of general claims against the bankrupt corporation, such said petitioning creditors having been subrogated only to a portion of such said general claims.

One who becomes subrogated only to a portion of a creditor's claim has not a provable claim in bankruptcy, unless such creditor fails or refuses to prove the entire claim, in which event the subrogated party may prove the claim in the name of the original creditor.

Two of the three claims set forth in the original involuntary petition in bankruptcy not being provable claims in bankruptcy, the District Court acquired no jurisdiction of the bankruptcy proceedings, and therefore committed error in denying the petition of the Appellants to vacate the adjudication in bankruptcy and committed error in granting the petition of the Appellee, George Giovanola, as Trustee in Bankruptcy, to dismiss the petition of the Appellants.

III.

Section 322a of the Civil Code of the State of California, under the authority of which said Code Section two of the original petitioners in the in-

voluntary petition [135] in bankruptcy based their claim, is unconstitutional insofar as it purports to allow partial subrogation, in that it infringes upon and impairs rights which had vested at the time of its enactment, and in that it is violative of the due process clauses and of the contracts and ipso facto clauses of the Constitution of the United States and the Constitution of the State of California.

If Section 322a of the Civil Code of the State of California is unconstitutional, then two of the three claims set forth in the original involuntary petition in bankruptcy are not valid claims, and the District Court therefore acquired no jurisdiction of the bankruptcy proceedings, and committed error in denying the petition of the Appellants to vacate the adjudication in bankruptcy and in granting the petition of the Appellee, George Giovanola, as Trustee in Bankruptcy, to dismiss the petition of the Appellants.

IV.

The District Court committed error in that it refused permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy.

V.

The District Court committed error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of the Appellants to vacate the original adjudication in bankruptcy, in that the said [136] George Giova-

nola, as Trustee in Bankruptcy, is an officer of the said District Court and has no right or standing in any proceedings challenging the jurisdiction of the said District Court, and in that such a petition to dismiss as directed by the said George Giovanola, as Trustee in Bankruptcy, to the petition of the Appellants to vacate the original adjudication in bankruptcy, is not authorized by statute or by the Federal Rules of Civil Procedure or by the Rules of the District Court of the United States, Southern District of California, Central Division.

DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION OF THE ABOVE STATEMENT OF POINTS ON APPEAL.

		Page of Certified Record
1.	Involuntary Petition for Adjudication of Bankruptcy	8
2.	Adjudication and Order of Reference	16
3.	Petition of J. H. McCune, et al, to Vacate Adjudication	17
4.	Answer of Petitioning Creditors to Petition of J. H. McCune, et al	61
5.	Motion of Trustee to Dismiss Petition of J. H. McCune, et al	54
6.	Reporter's Transcript of Proceedings (see original Transcript on file)	
7.	Memorandum of Decision	67
8.	Order Denying Petition to Vacate Adjudication	68

Page of Certified Record

9. Notice of Appeal from Order Denying Petition to Vacate Adjudication 70
10. Petition for Appeal from Order Denying Petition to Vacate Adjudication 72
11. Assignment of Errors on Appeal from Order Denying Petition to Vacate Adjudication 74
12. Citation on Appeal from Order Denying Petition to Vacate Adjudication 2
13. Designation of Record on Appeal from Order Denying Petition to Vacate Adjudication 86
14. Statement of Points on Appeal 76

Respectfully submitted,
T. H. CANFIELD,
Attorney for Appellants.

Receipt of a copy of the within "Statement of Points on Appeal and Designation of Record" is hereby admitted this 21st day of August, 1939.

JOHN WILLIAM HEANEY,
FRANCIS PRICE,
A. C. POSTEL,
HAROLD A. PARMA,
By WARNER EDMONDS, JR.
Attorney for First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson, and Catherine Davidson. [138]

Receipt of a copy of the within "Statement of Points on Appeal and Designation of Record" is hereby admitted this 21st day of August, 1939.

W. P. BUTCHER,
Attorney for George Giovanola, as Trustee in Bankruptcy.

[Endorsed]: Filed Aug. 22, 1939. Paul P. O'Brien, Clerk. [139]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL FROM ORDER GRANTING INTERVENTION AND DESIGNATION OF RECORD.

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants in the matter of the appeal from the order of the District Court of the United States, Southern District of California, Central Division, granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Appellees herein, for leave to intervene in said bankruptcy proceedings, respectfully submit the following statement of points and designation of the record necessary for the consideration thereof. [142]

STATEMENT OF POINTS ON APPEAL

I.

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy after an involuntary adjudication in bankruptcy has been made and entered. In the instant case the involuntary adjudication in bankruptcy had been made and entered prior to the time the petitioning creditors, being the Appellees herein, filed their petition for permission to intervene. The District Court of the United States, Southern District of California, Central Division, therefore, committed error in granting the petition for leave to intervene.

II.

The original petition in involuntary bankruptcy filed in the said bankruptcy proceedings upon which the involuntary adjudication of bankruptcy was made, was insufficient on its face to give the Court any jurisdiction in the bankruptcy proceedings, by reason of the fact that it appears from the face of such said involuntary petition in bankruptcy that two of the petitioning creditors did not have provable claims in bankruptcy. It follows, therefore, that if the District Court had not acquired any jurisdiction of the bankruptcy proceedings, it committed error in granting the petition of the intervening creditors, being the Appellees herein, for permission to intervene in said bank- [143] ruptcy proceedings.

III.

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy if the original involuntary petition is not sufficient on its face to give the Court jurisdiction to make the adjudication. If, as contended by Appellants, the original involuntary petition was insufficient to give the Court jurisdiction, then the District Court committed error in granting the petition of the intervening creditors, being the Appellees herein, for permission to intervene.

IV.

The petition of the intervening creditors fails to state or set forth sufficient facts upon which an intervention could be granted, and fails to state sufficient facts to establish that the petitioners therein have provable claims in bankruptcy or are entitled to intervene in the bankruptcy proceedings. These points having been raised by the answer of the Appellants to the petition of the intervening creditors for leave to intervene, if the petition of such intervening creditors was not sufficient on its face, the District Court commited error in granting the petition of such intervening creditors for permission to intervene.

V.

The issues of fact raised by the petition of the [144] intervening creditors for leave to intervene in the bankruptcy proceedings, and the answer to the petition of intervening creditors filed on behalf of the Appellants, were not determined by the District

Court, and no evidence having been offered or received in support of the petition for leave to intervene, the petition should not have been granted.

DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION OF THE ABOVE STATEMENT OF POINTS ON APPEAL.

Page of Certified Record

1. Involuntary Petition for Adjudication of Bankruptcy 8
2. Adjudication and Order of Reference 16
3. Petition of Thomas J. Smitheram, et al, in Intervention 38
   Exhibit "A"—Proof of Unsecured Debt, Squier and Goux 43
   Exhibit "B"—Proof of Unsecured Debt, Smitheram 51
4. Answer of J. H. McCune, et al, to Petition in Intervention 57
5. Reporter's Transcript of Proceedings (see original Transcript on file)
6. Memorandum of Decision 67
7. Order Allowing Intervention of Creditors 69
8. Notice of Appeal from Order Allowing Intervention 79
9. Petition for Appeal from Order Allowing Intervention 80

[145]

Page of Certified Record

10. Assignment of Errors on Appeal from Order Allowing Intervention 82
11. Citation on Appeal from Order Allowing Intervention 5
12. Designation of Record on Appeal from Order Allowing Intervention 88
13. Statements of Points on Appeal 84

Respectfully submitted,
T. H. CANFIELD,
Attorney for Appellants.

Receipt of a copy of the within "Statements of Points on Appeal and Designation of Record" is hereby admitted this 21st day of August, 1939.

STANLEY TOMLINSON,
W. P. BUTCHER,
Attorneys for Thomas J. Smitheram, E. W. Squier, and J. F. Goux.

[Endorsed]: Filed Aug. 22, 1939. Paul P. O'Brien, Clerk. [146]

In the District Court of the United States for the Southern District of California, Central Division.

In Bankruptcy No. 31,965-C

In the Matter of

MORTGAGE SECURITIES, INC., OF SANTA BARBARA, a corporation,

Bankrupt.

SUBSTITUTION OF ATTORNEYS

We hereby request that W. P. Butcher, Esq., be substituted as our attorney in the place and stead of John William Heaney, Francis Price, A. C. Postel and Harold A. Parma, Esqs., in the above entitled action.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA,
By ROBERT E. LEWIS,
Vice President.

HORACE P. HOEFER,
PETER DAVIDSON,
CATHERINE DAVIDSON.

We hereby consent to the above substitution.

JOHN WILLIAM HEANEY,
FRANCIS PRICE,
A. C. POSTEL,
HAROLD A. PARMA,
By JOHN WILLIAM HEANEY.

I hereby accept the above substitution.

W. P. BUTCHER.

Dated: August 18, 1939. [148]

Service of the foregoing Substitution of Attorneys by receipt of a copy thereof, is hereby admitted this 24th day of August, 1939.

T. H. CANFIELD,

Attorney for Fred D. Jackson, Alice W. Jackson, Alice P. Jackson, and J. H. McCune.

[Endorsed]: Filed Aug. 25, 1939. Paul P. O'Brien, Clerk. [149]

No. 9270

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, *and* GEORGE GIOVANOLA, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, *and* J. F. GOUX,

Appellees,

APPELLANT'S OPENING BRIEF

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

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THE SCHAUER PRINTING STUDIO, LAW PRINTERS, SANTA BARBARA

SUBJECT INDEX

Page

I.

Statement of pleadings and fact disclosing the basis upon which it it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the orders in question 1

II.

Statement of the Case 6

III.

Specification of Errors 14

IV.

Argument of the Case 16

A.—Argument on the appeal from the order of the District Court denying the petition of the Appellants for an order vacating the adjudication in bankruptcy. 17

I.

The purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, representing two of the claims on which the involuntary petition in bankruptcy was based, did not constitute provable claims in bankruptcy, which fact appeared from the face of the involuntary petition, by reason of being subrogation claims to only a portion of a larger claim, and

by reason of the fact that Section 322a of the Civil Code of the State of California, from which statutory authority such said claims arise, is unconstitutional as to general creditors of the insolvent corporation. The original petition in bankruptcy, not being based on provable claims in bankruptcy, was insufficient on its face to give the District Court any jurisdiction, and the order of adjudication was, therefore, void. 17

II.

The District Court committed error in refusing permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy. 30

III.

The District Court committed error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of the Appellants to vacate the original adjudication in bankruptcy. 32

B.—Argument on the appeal from the order of the District Court allowing the intervention of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, and joining the

Page

intervenors in the original involuntary petition in bankruptcy. 40

I.

The District Court committed error in granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, for leave to intervene and be joined as petitioning creditors in the original involuntary petition, in that an involuntary adjudication in bankruptcy had already been made and had not been vacated, and in that the original involuntary petition in bankruptcy was insufficient on its face to give the said District Court any jurisdiction of the proceedings. 40

II.

The District Court committed error in granting the petition of the intervening creditors for leave to intervene and be joined in the original involuntary petition in bankruptcy, when an answer to the petition of the said intervening creditors had been filed and no determination of the issues raised by such answer had been made. 43

III.

The District Court committed error in granting the said petition for leave to intervene, in that such said petition fails to state or set forth sufficient facts to establish that the said petitioners had

Page

provable claims in bankrupcy, and in that the said petition fails to state or set forth sufficient facts upon which an intervention could be granted. 47

V.

Conclusion 48

TABLE OF CASES AND AUTHORITIES CITED

Page

American Surety Company of New York vs. Westinghouse Electric Manufacturing Company, 296 U. S. 133 24

Bankruptcy Act, Section 59, Subdivision b, as in effect at the time of the filing of the involuntary petition in bankruptcy. 19

Bankruptcy Act, Section 57, Subdivision i, as in effect at the time of the fiiling of the involuntary petition in bankruptcy. 23

Bankruptcy Act, of 1898, Section 59, Subdivision f. 41

Cal. Juris., Volume 6a, pages 1023 and 1024, and cases cited. 27

Canute Steamship Company vs. Pittsburgh and West Virginia Coal Company, 263 U. S. 244. .....41, 42

Civil Code of the State of California, Section 322a. .....
.....7, 9, 13, 17, 18, 21, 22, 26, 27, 28, 29

Civil Code of the State of California, Section 322. .....26, 27

Columbia Finance and Trust Company vs. Kentucky Union Railroad Co., 6 Fed. 794, at 796. 28

Constitution of the United States—Amendment 14..... 29

Constitution of the United States—Article 1, para. 10, Clause 1.... 29

Constitution of California, Article 1, paragraphs 13 and 16 29

Cutler vs. Nu-Gold Ring Co., 264 Fed. 836 20

Doty, et al., vs. Mason, 244 Fed. 587 20

Hana vs. Brictson Manufacturing Company, 62 Fed. 2nd 139 34

In Re: Bedingfield, 96 Fed. 190 .....41, 43

In Re: Charlestown Light and Power Co., 183 Fed. 160 41

In Re: Crafts-Riordon Shoe Company, 185 Fed. 931 20

In Re: Columbia Real Estate Company, 101 Fed. 965 35

In Re: Diamond Fuel Co., 6 Fed. 2nd. 773 41

In Re: Ettinger, 76 Fed. 2nd 741 .....35, 38

In Re: Farthing, 202 Fed. 557 20

In Re: Free Gold Mining and Milling Co., 2 Fed. Supplement 118. 34

In Re: Gillette, 104 Fed. 769 20

In Re: Glory Bottling Company of New York Inc., 278 Fed. 625.... 21

TABLE OF CASES AND AUTHORITIES CITED

Page

In Re: Hanson and Tyler Auto Company, 286 Fed. 161 23
In Re: Heyman, 95 Fed. 800 .....23, 24, 26
In Re: Howell, 215 Fed. 1 20
In Re: Jutte and Co., 258 Fed. 422 41
In Re: Independent Thread Co., 113 Fed. 998 21
In Re: Kootenai Motor Co. Inc., 41 Fed. 2nd. 399 41
In Re: Lewis S. Perry and Whitney Co., 172 Fed. 745 21
In Re: Manhattan Brush Manufacturing Company, 209 Fed. 997.. .....23, 24, 26
In Re: New York Tunnel Co., 166 Fed. 284 .....20, 34
In Re: Pickering Lumber Co., 1 Fed. Supplement 82 20
In Re: Plymouth Cordage Co., 135 Fed. 1000 41
In Re: St. Lawrence Condensed Milk Corporation, 9 Fed. 2nd 896 20
In Re: Tribelhorn, 137 Fed. 3 21
Insley vs. Garside, 121 Fed. 699 23
In Re: Stein vs. 130 Federal, 377 43
In Re: Shell Metal Products Inc., 19 Fed. Supplement, 785 39
J. S. Farming Co. vs. Brannon, 263 Fed. 891 23
Phillips vs. Dreher Shoe Co., 112 Fed. 404 .....20, 24, 26
Stroheim vs. Lewis S. Perry and Whitney Co., 175 Fed. 52 21
Swartz vs. Seigel, 117 Fed. 13 23
Swartz vs. Fourth National Bank of St. Louis, 117 Fed. 1 24
Williams vs. U. S. Fidelity Co., 236 U. S. 549 .....23, 26

No. 9270

IN THE

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J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

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vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, *and* GEORGE GIOVANOLA, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, *and* J. F. GOUX,

Appellees,

Appellant's Opening Brief

STATEMENT OF PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT

COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENTS, DECREES, OR ORDERS IN QUESTION.

This case arises in the District Court of the United States, Southern District of California, Central Division, sitting as a Court of Bankruptcy. On May 9th, 1938, an involuntary petition in bankruptcy was filed against Mortgage Securities Inc. of Santa Barbara, a corporation, in the said District Court by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson, Appellees herein. (Transcript of Record, pages 5 to 16). On June 1st, 1938, Mortgage Securities Inc. of Santa Barbara, a corporation, was adjudicated bankrupt and a reference made to Hugh J. Weldon, Referee in Bankruptcy, Santa Barbara, California. (Transcript of Record, pages 16 and 17).

On April 20th, 1939, Appellants, as creditors and stockholders of Mortgage Securities Inc. of Santa Barbara, a corporation, filed in the said District Court a petition for an order vacating the adjudication of bankruptcy. (Transcript of Record, pages 17 to 44). An answer to this petition was filed on June 5th, 1939, by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson, Appellees and original petitioners in the involuntary petition in bankruptcy. (Transcript of Record, pages 70 to 74). In addition thereto, George Giovanola, as Trustee

in Bankruptcy appointed by the said Hugh J. Weldon, Referee in Bankruptcy to whom the bankruptcy matter had been referred, filed a motion to dismiss the petition of the Appellants for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 61 to 65).

On May 23rd, 1939, Thomas J. Smitheram, E. W. Squier and J. F. Goux, Appellees herein, filed in the said District Court a petition praying to be joined as intervening petitioning creditors for the adjudication of Mortgage Securities Inc. of Santa Barbara as a bankrupt, to supplement the creditors named in the original petition in bankruptcy, and praying that the petition of the Appellants for an order vacating the original adjudication in bankruptcy be denied. (Transcript of Record, pages 41 to 61). To this petition, the Appellants on June 5th, 1939, filed an answer. (Transcript of Record, pages 65 to 74).

The petition of the Appellants for an order vacating the adjudication in bankruptcy and the petition of Thomas J. Smitheram, E. W. Squier and J. F. Goux, Appellees, to be joined as intervening creditors for the adjudication of Mortgage Securities Inc. of Santa Barbara as a bankrupt, came on for hearing and were argued together on May 29th, 1939. Subsequently thereto, the said District Court made its order denying the petition of the Appellants to vacate the order of adjudication, and made its order allowing the intervention of Appellees Thomas J. Smitheram, E. W. Squier, and J. F. Goux and joining them as petitioning creditors in the original

involuntary petition in bankruptcy. (Transcript of Record, pages 75 to 78). Appellants have appealed from both of such orders.

The District Court of the United States, Southern District of California, Central Division, had original jurisdiction of the proceedings, as initiated by the filing of the involuntary petition in bankruptcy, by reason of being a Court of Bankruptcy as defined and created by the Bankruptcy Act of the United States, Sections 1 and 2 thereof.

The United States Circuit Court of Appeals for the Ninth District has jurisdiction upon appeal to review the orders in question, by reason of being invested with appellate jurisdiction from the said District Court as a Court of Bankruptcy. The instant matter being a proceeding in bankruptcy, jurisdiction of the appeal is with this Court. (Bankruptcy Act, Section 24).

The jurisdiction of this Court to entertain the appeals also rests upon the following documents, filed in the instance of the appeal from each of the said orders of said District Court:

Notice of Appeal (Transcript of Record, pages 78 and 79.)

Notice of Appeal (Transcript of Record, pages 85 and 86.)

Assignment of Errors (Transcript of Record, pages 88 and 89.)

Assignment of Errors (Transcript of Record, pages 81 and 82.)

Citation (Transcript of Record, pages 2 and 3.)

Citation (Transcript of Record, pages 4 and 5.)

Order Allowing Appeal (Transcript of Record, page 81.)

Order Allowing Appeal (Transcript of Record, page 88.)

Petition for Appeal (Transcript of Record, pages 80 and 81.)

Petition for Appeal (Transcript of Record, pages 87 and 88.)

Designation of Record,
District Court. (Transcript of Record, pages 92 and 93.)

Designation of Record,
District Court. (Transcript of Record, pages 94 and 95.)

Designation of Record,
Circuit Court. (Transcript of Record, pages 140 and 141.)

Designation of Record,
Circuit Court. (Transcript of Record, pages 135 and 136.)

Statement of Points,
District Court. (Transcript of Record, pages 90 to 93.)

Statement of Points,
District Court. (Transcript of Record, pages 83 to 85.)

Statement of Points,
Circuit Court. (Transcript of Record, pages 131 to 135.)

Statement of Points,
Circuit Court. (Transcript of Record, pages 137 to 140.)

STATEMENT OF THE CASE

Mortgage Securities Inc. of Santa Barbara is a California Corporation. Prior to 1931, this Corporation became indebted to the First National Trust and Savings Bank of Santa Barbara in the principal sum of $50,000.00, plus interest, and to the County National Bank and Trust Company of Santa Barbara in the principal sum of $30,000.00, plus interest.

Horace P. Hoefer, and Peter Davidson and Catherine Davidson, Appellees herein, were stockholders of Mortgage Securities Inc. of Santa Barbara. Prior to any of the instant proceedings, the First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara, for the purpose of enforcing payment of the indebtedness of Mortgage Securities Inc. of Santa Barbara from the stockholders of such Corporation, assigned their claims against the Corporation to G. Virginia Kaysser. The said G. Virginia Kaysser thereupon instituted an action in the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California, against various stockholders of Mortgage Securities Inc. of Santa Barbara, including Horace P. Hoefer, and Peter Davidson and Catherine Davidson, seeking to collect from such stockholders the amount of their proportionate liability for payment of the claim of such said Banks against

Mortgage Securities Inc. of Santa Barbara. The said Horace P. Hoefer thereupon paid to the First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara the sum of $296.00 in payment of his liability as a stockholder of the Mortgage Securities Inc. of Santa Barbara for the proportionate payment of such creditor claims. The said Peter Davidson and Catherine Davidson thereupon paid to the said First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara the sum of $555.00 in payment of their liability as stockholders of said Mortgage Securities Inc. of Santa Barbara for the proportionate payment of such said creditor claims. By reason of such payments the said Horace P. Hoefer and Peter Davidson and Catherine Davidson claimed to be subrogated, to the extent of such payments of $296.00 and $555.00 respectively, to the claims of the said First National Trust and Savings Bank of Santa Barbara and County National Bank and Trust Company of Santa Barbara against Mortgage Securities Inc. of Santa Barbara, basing their right and claim of subrogation upon the provisions of Section 322a of the Code of Civil Procedure of the State of California. Section 322a of the Code of Civil Procedure of the State of California provides that any shareholder who because of his proportionate stockholder's liability has paid any payment in discharge in whole or in part of any debt or liability of a corporation shall be subrogated to the extent of such payment to the claim of the creditors against the corporation. This

statute was added to the Civil Code of the State of California in 1931.

J. H. McCune, one of the Appellants herein, is a creditor of Mortgage Securities Inc. of Santa Barbara, with a provable claim in bankruptcy, being the assignee of the claim of the County National Bank and Trust Company of Santa Barbara hereinabove mentioned. Alice W. Jackson, one of the Appellants herein, is a creditor of Mortgage Securities Inc. of Santa Barbara, with a provable claim in bankruptcy. Fred D. Jackson and Alice P. Jackson, also Appellants herein, are stockholders of Mortgage Securities Inc. of Santa Barbara.

On May 9th, 1938, an involuntary petition in bankruptcy was filed against Mortgage Securities Inc. of Santa Barbara by First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, and Peter Davidson and Catherine Davidson, Appellees herein. The creditor claim of First National Trust and Savings Bank of Santa Barbara, as set forth in said petition in involuntary bankruptcy, arises from the indebtedness of Mortgage Securities Inc. of Santa Barbara to such Bank as hereinabove mentioned. The purported creditor claim of Horace P. Hoefer, as set forth in the involuntary petition in bankruptcy, is a purported claim against Mortgage Securities Inc. of Santa Barbara arising from the purported subrogation of Horace P. Hoefer to a portion of the claims of First National Trust and Savings Bank of Santa Barbara and County National Bank and Trust Company of Santa Barbara as hereinabove described. The

purported claim of Peter Davidson and Catherine Davidson is also a purported subrogated claim as hereinabove described. Upon such involuntary petition in bankruptcy, the Corporation was adjudicated a bankrupt on June 1, 1938, and a reference made to Hugh J. Weldon, Referee in Bankruptcy at Santa Barbara, California. Subsequent thereto on July 1st, 1938, a purported creditors' meeting was called by the said Referee in Bankruptcy and one George Giovanola was purportedly elected Trustee in Bankruptcy of the estate of the said bankrupt. No further proceedings were had until February 2, 1939, on which date the Referee purportedly held an adjourned creditors' meeting for the purpose of examining witnesses. The Appellants appeared at such meeting and made objection to the holding of the meeting and to any further proceedings in the bankruptcy matter on the ground that the involuntary petition in bankruptcy originally filed was insufficient on its face to give the said District Court any jurisdiction to make the adjudication, and that such adjudication and all subsequent proceedings were, therefore, void. The objections were based upon the ground that the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, being only subrogated claims under the authority of Section 322a of the Civil Code of the State of California, did not constitute provable claims in bankruptcy and that, therefore, the involuntary petition in bankruptcy was insufficient to give the District Court jurisdiction to make the adjudication. The objections of the Appellants were overruled by the Referee

and a subsequent meeting of creditors called on February 21st, 1939, at which time Appellants again appeared and objected to the meeting and any other proceedings in the bankruptcy matter upon the grounds above stated. At both of such meetings the Referee in Bankruptcy and the Appellees were notified by the Appellant that a petition was being prepared and would be presented to the said District Court asking that the adjudication be vacated and set aside.

On April 20, 1939, Appellants filed in the said District Court their petition asking for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 17 to 44). This petition alleges and sets forth in detail all of the various facts hereinabove set forth and all the facts pertinent to the proceedings, and prays that the adjudication in bankruptcy be set aside by reason of the fact that the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson did not constitute provable claims in bankruptcy, and that, therefore, the original petition in involuntary bankruptcy was insufficient to give the District Court any jurisdiction to make the adjudication in bankruptcy.

On May 23rd, 1939, before the petition of the Appellants to vacate the original adjudication in bankruptcy came on to be heard before the said District Court, Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Appellees herein, filed in said District Court a petition praying to be joined as intervening petitioning creditors for the adjudication of Mortgage Securities Inc. of Santa

Barbara as a bankrupt, to supplement the creditors named in the original petition in bankruptcy, and praying that the petition of the Appellants for an order vacating the original adjudication in bankruptcy be denied. (Transcript of Record, pages 44 to 61). To this petition the Appellants on June 5th, 1939, filed an answer. (Transcript of Record, pages 65 to 74).

The petition of the Appellants for an order vacating the adjudication in bankruptcy and the petition of Thomas J. Smitheram, E. J. Squier and J. F. Goux, Appellees, to be joined as intervening creditors for the adjudication of Mortgage Securities Inc. of Santa Barbara as a bankrupt came on for hearing, and were argued together, on May 29, 1939. The matters came on for hearing at that time, not upon their merits, but for presentation of argument on the various points of law involved. Subsequently thereto, the said District Court made its order denying the petition of the Appellants to vacate the order of adjudication, and made its order allowing the intervention of Appellants Thomas J. Smitheram, E. W. Squier and J. F. Goux, and joining them as petitioning creditors in the original involuntary petition. (Transcript of Record, pages 75 to 78). It is from these orders that appeals were taken by the Appellants, such said appeals having been consolidated by the order of this Court, upon petition and stipulation of all interested parties.

The facts hereinabove set forth appear in the following portions of the record:

Involuntary Petition for Adjudication of Bankruptcy, (Transcript of Record, pages 5 to 17).

Adjudication and Order of Reference, (Transcript of Record, pages 16 and 17).

Petition for Order Vacating Adjudication of Bankruptcy, (Transcript of Record, pages 17 to 44).

Petition of Intervening Creditors, (Transcript of Record, pages 45 to 61).

Reporter's Transcript, (Transcript of Record, pages 97 to 127).

The questions involved in the appeal of the Appellants from the order of the said District Court denying the petition of the Appellants for an order vacating the original adjudication in bankruptcy, and the manner in which such questions are raised, may be briefly stated as follows:

1. Are the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, original petitioners in the involuntary petition in bankruptcy, provable claims in bankruptcy against Mortgage Securities Inc. of Santa Barbara?

a. Has a stockholder of a corporation a provable claim in bankruptcy against such corporation as against general creditors of the corporation, when such purported claim is merely a portion of a larger creditor claim against said corporation to which portion the stockholder has been purportedly subrogated by reason of his payment of such portion of said claim by reason of his stockholder's liability for payment of the debts of the corporation?

b. Is Section 322a of the Civil Code of the State of California constitutional as against general creditors of an insolvent corporation?

2. Did the District Court commit error in refusing permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy.

3. Did the District Court commit error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of the Appellants to vacate the original adjudication in bankruptcy?

All of these questions are raised in connection with, and will be determinative of, the petition of the Appellants to vacate the original adjudication in bankruptcy, which said petition was denied by the District Court.

The questions involved in the appeal of the Appellants from the order of the District Court allowing Thomas J. Smitheram, E. W. Squier and J. F. Goux to intervene and be joined as intervening petitioning creditors in the petition in involuntary bankruptcy, and the manner in which they are raised, may be briefly stated as follows:

1. Can additional creditors of an alleged bankrupt intervene to join in an involuntary petition in bankruptcy after an involuntary adjudication in bankruptcy has been made upon the original involuntary petition which was filed?

2. If an original involuntary petition in bankruptcy is insufficient on its face to give the District Court jurisdiction to make an adjudication in bankruptcy, can additional creditors intervene and be joined in such original involuntary petition?

3. Does the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, as intervening creditors, state or set forth sufficient facts upon which an intervention could be granted?

4. Did the District Court commit error in granting the petition of the intervening creditors for leave to intervene and be joined in the original involuntary petition in bankruptcy, when an answer to the petition of the said intervening creditors had been filed and no determination of the issues raised by said answer had been had?

All of these questions are raised in connection with, and will be determinative of, the petition of Thomas J. Smitheram, E. W. Squier and J. F. Goux for permission to intervene and join in the original involuntary petition in bankruptcy, which petition was granted by the said District Court.

SPECIFICATION OF ERRORS

In connection with the appeal from the order of the District Court denying the petition of the Appellants to vacate the original adjudication in bankruptcy, Appellants respectfully urge the following:

1. That the District Court of the United States, Southern District of California, Central Division, committed error in denying the petition of the Appellants for an order vacating the original adjudication in bankruptcy, in that the original involuntary petition in bankruptcy was insufficient on its face to give the said District Court any jurisdiction of the proceeding, and in that the original adjudication of bankruptcy was void and in excess of the jurisdiction of the said District Court.

2. That the said District Court committed error in refusing permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy.

3. That the said District Court committed error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of Appellants to vacate the original adjudication in bankruptcy.

In connection with the appeal from the order of the District Court of the United States, Southern District of California, Central Division, granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux to intervene and be joined as petitioning creditors in the original involuntary petition in bankruptcy, the Appellants respectfully urge the following:

1. That the said District Court committed error in granting the said petition of the said Thomas J. Smitheram, E. W. Squier, and J. F. Goux, for leave to intervene and be joined as petitioning creditors in the original

involuntary petition, in that an involuntary adjudication in bankruptcy had already been made and had not been vacated, and in that the original involuntary petition in bankruptcy was insufficient on its face to give the said District Court any jurisdiction of the proceeding.

2. The said District Court committed error in granting the said petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, prior to the determination of the issues of fact raised by such said petition and by the answer to such said petition filed on behalf of the Appellants. (Petition for leave to intervene appears in Transcript of Record at pages 44 to 61. Answer to such petition by Appellants appears in such said Transcript of Record at pages 65 to 69).

3. The said District Court committed error in granting the said petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene and be joined as petitioning creditors in the original petition in involuntary bankruptcy, in that such said petition fails to state or set forth sufficient facts to establish that the said petitioners had provable claims in bankruptcy or were entitled to intervene in the bankruptcy proceedings.

ARGUMENT OF THE CASE

Inasmuch as the orders appealed from arise in and from the same bankruptcy proceeding, the appeals therefrom have been consolidated. The argument on the appeals is here presented in two subdivisions, however, for the purpose of clarity. Further necessary facts and de-

tails appear in connection with the argument presented on each point hereinafter set forth.

"A"

ARGUMENT ON THE APPEAL FROM THE ORDER OF THE DISTRICT COURT DENYING THE PETITION OF THE APPELLANTS FOR AN ORDER VACATING THE ADJUDICATION IN BANKRUPTCY

I.

THE PURPORTED CREDITOR CLAIMS OF HORACE P. HOEFER AND PETER DAVIDSON AND CATHERINE DAVIDSON, REPRESENTING TWO OF THE CLAIMS ON WHICH THE INVOLUNTARY PETITION IN BANKRUPTCY WAS BASED, DID NOT CONSTITUTE PROVABLE CLAIMS IN BANKRUPTCY, WHICH FACT APPEARED FROM THE FACE OF THE INVOLUNTARY PETITION, BY REASON OF BEING SUBROGATION CLAIMS TO ONLY A PORTION OF A LARGER CLAIM, AND BY REASON OF THE FACT THAT SECTION 322a OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, FROM WHICH STATUTORY AUTHORITY SUCH SAID CLAIMS ARISE, IS UNCONSTITUTIONAL AS TO GENERAL CREDITORS OF THE INSOLVENT CORPORATION. THE ORIGINAL PETITION IN BANKRUPTCY, NOT BEING BASED ON

PROVABLE CLAIMS IN BANKRUPTCY, WAS INSUFFICIENT ON ITS FACE TO GIVE THE DISTRICT COURT ANY JURISDICTION, AND THE ORDER OF ADJUDICATION WAS, THEREFORE, VOID.

In connection with this point it must be remembered that, as fully set out in the statement of the case hereinabove set forth, the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson are founded upon the payment by such said parties as stockholders of the bankrupt corporation of their proportionate stockholders liability to general creditors of the bankrupt, and the purported subrogation under the provisions of Section 322a of the Civil Code of the State of California to a portion of the claims of such general creditors against the said bankrupt. Both of such claims are portions only of two general claims against the bankrupt, being portions of the claim of the First National Trust and Savings Bank of Santa Barbara, and the claim of J. H. McCune, as assignee of the County National Bank and Trust Company of Santa Barbara. The third claim upon which the said involuntary petition in bankruptcy was based is the claim of the First National Trust and Savings Bank of Santa Barbara. It follows, therefore, that only one direct claim against the bankrupt is included or presented in the involuntary petition in bankruptcy, being the said claim of the First National Trust and Savings Bank of Santa Barbara. The other two claims are merely portions of the claims of the said First National Trust and Savings Bank of Santa Barbara and

J. H. McCune, as assignee of the County National Bank and Trust Company of Santa Barbara. The original petition in involuntary bankruptcy is predicated, therefore, upon one direct claim against the Corporation, and upon two claims which constitute a portion of the direct claim of the First National Trust and Savings Bank of Santa Barbara and a portion of the claim of J. H. McCune as assignee of the County National Bank and Trust Company of Santa Barbara. These facts appear without contradiction in the original involuntary petition in bankruptcy and in the petition of the Appellants for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 17 to 44, and pages 5 to 17).

An involuntary petition in bankruptcy must be filed by three or more creditors who have provable claims against a person which amount in the aggregate, in excess of the securities held by them, if any, to $500.00 or over, or if all creditors of such person are less than twelve in number, then the involuntary petition may be filed by one of such creditors.

AUTHORITY

Bankruptcy Act, Section 59, Subdivision b, as in effect at the time of the filing of the involuntary petition in bankruptcy.

The words of Section 59, Subdivision b, of the Bankruptcy Act in effect at the time of the filing of the involuntary petition in bankruptcy herein, state certain jurisdictional allegations of all involuntary petitions. It is

absolutely necessary that each creditor joining in an involuntary petition should be the owner of a demand or claim provable against the bankrupt within the provisions of the act. The existence of provable claims to the requisite amount is jurisdictional in an involuntary proceeding, and if such jurisdictional defects appear on the face of the record, the adjudication is void.

AUTHORITIES

In Re: *Howell,* 215 Fed. 1.

In Re: *Crafts-Riordon Shoe Company,* 185 Fed. 931.

In Re: *New York Tunnel Co.,* 166 Fed. 284.

In Re: *St. Lawrence Condensed Milk Corporation,* 9 Fed. 2nd 896.

Cutler vs. Nu-Gold Ring Co., 264 Fed. 836.

Doty, et al., vs. Mason, 244 Fed. 587.

In Re: *Farthing,* 202 Fed. 557.

In Re: *Gillette,* 104 Fed. 769.

In Re: *Pickering Lumber Co.,* 1 Fed. Supplement 82.

Phillips vs. Dreher Shoe Co., 112 Fed. 404.

It is a well established rule that Courts of law do not recognize partial assignments of choses in action; and hence a partial assignee has no legal standing to enforce a partial assignment against a debtor who has not consented thereto. This is on the theory that a creditor cannot divide an entire demand into distinct parts and maintain separate actions upon each, since this would subject

the debtor to conditions to which he never assented and involve him in embarrassment and responsibilities never contemplated. A creditor will not be permitted by assignment to enable others to do what he cannot do.

It is also well established that the Bankruptcy Act does not sanction the splitting of a claim into parts in order to create a sufficient number of petitioning creditors to support an involuntary petition in bankruptcy.

AUTHORITIES

Stroheim vs. Lewis S. Perry and Whitney Co., 175 Fed. 52.

In Re: *Tribelhorn,* 137 Fed. 3.

In Re: *Independent Thread Co.,* 113 Fed. 998.

In Re: *Glory Bottling Company of New York Inc.,* 278 Fed. 625.

In Re: *Lewis S. Perry and Whitney Co.,* 172 Fed. 745.

In the instant case, it must be remembered that the claims of two of the petitioning creditors are portions only of two general claims against the bankrupt. It must further be remembered that one of the general claims against the bankrupt, of which the other two claims are a portion thereof, is the claim of the third petitioning creditor, First National Trust and Savings Bank of Santa Barbara.

It is the position of the Appellant herein that Section 322a of the Civil Code of the State of California, under which statutory authority the purported creditor claims

of Horace P. Hoefer and Peter Davidson and Catherine Davidson arise, is unconstitutional, and the authorities in this respect are hereinafter set forth. If, however, Section 322a of the Civil Code of the State of California is held to be constitutional, the creditors who filed the involuntary petition in bankruptcy, with the exception of the First National Trust and Savings Bank of Santa Barbara, can only be deemed to hold claims against the bankrupt by reason of their purported partial subrogation to certain other creditor claims, which said purported partial subrogation has been brought about by the payment of a purported stockholders' liability to such said other creditors. In other words, the purported provable claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson arise from the fact that they purport to have been partially subrogated to the claims of other creditors of the bankrupt.

In such an instance, such petitioning creditors have only been subrogated to a portion of such other claims against the bankrupt, and stand in the same relative position as exists in the case of other types of subrogation. The situation of a surety who has paid his principal claim or a portion thereof is directly analogous to the position of such said petitioning creditors. The same rules of law should, therefore, be applicable to the purported subrogated claims of the petitioning creditors herein as has been applied in the case of the subrogated claim of a surety.

Section 57, Subdivision i, of the Bankruptcy Act, as in force at the time of the filing of the involuntary petition, provides that whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharges such obligation in whole or in part he shall be subrogated to that extent to the rights of the creditor.

AUTHORITIES

Section 57, Subdivision i, Bankruptcy Act as in force at the date of the filing of the involuntary petition.

Swartz vs. Siegel, 117 Fed. 13.

Williams vs. U. S. Fidelity Co., 236 U. S. 549.

It has been frequently held, however, that the surety may not prove the claim except that the creditor fails to do so.

AUTHORITIES

Insley vs. Garside, 121 Fed. 699.

In Re: *Heyman,* 95 Fed. 800.

In Re: *Hanson and Tyler Auto Company,* 286 Fed. 161.

In Re: *Manhattan Brush Manufacturing Company,* 209 Fed. 997.

J. S. Farming Co. vs. Brannon, 263 Fed. 891.

It is also held that a surety who has paid his whole debt which is only a portion of the creditor's claim is not

subrogated to the creditor's right, although the creditor will hold any surplus received above the amount of his claim in trust for the surety.

AUTHORITIES

Swartz vs. Fourth National Bank of St. Louis, 117 Fed. 1.

In Re: *Heyman,* 95 Fed. 800.

In Re: *Manhattan Brush Manufacturing Company,* 209 Fed. 997.

Again it has been held that a surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the principal by reason of such payment until the debt thus partially protected has been satisfied in full.

AUTHORITY

American Surety Company of New York vs. Westinghouse Electric Manufacturing Company, 296 U. S. 133.

It is also held that a surety who has not paid the entire debt is not entitled to petition for an adjudication in bankruptcy against the principal.

AUTHORITY

Phillips vs. Dreher Shoe Company, 112 Fed. 404.

It would appear, therefore, in the case of Horace P. Hoefer and Peter Davidson and Catherine Davidson, two of the petitioning creditors in the involuntary peti-

tion in bankruptcy, that such persons, having become subrogated only to a portion of other creditors' claims against the Corporation, occupy the same position as an endorser or surety who has partially satisfied the claim against a principal and become subrogated to a creditor's right against the principal. In such an instance, it would appear that the only recourse of the said Horace P. Hoefer and the said Peter Davidson and Catherine Davidson would be to have such other creditors, to a portion of whose claims they have become subrogated, prove the claim in bankruptcy. If such other creditors neglected to do so, or failed to do so, then the subrogated parties might prove the creditors' claim in the name of such creditors but not in their own name. The fact that such petitioning creditors have paid a portion of creditors' claims against the bankrupt would not mean that they can prove in bankruptcy for such payment against the bankrupt or the bankrupt's estate. If the original creditors, having proved such claims against the bankrupt, should receive from the bankrupt their entire claim, they would hold an amount equal to that which the said subrogated creditors had paid in trust for such creditors, and would be obligated to reimburse them in such amount. Where, however, a portion only of such creditors' claim has been paid, as in the instant case, by stockholders of the bankrupt, such creditors are entitled to receive the entire dividends of the bankrupt estate under their proof as creditors until the amount paid to them in the shape of dividends from the bankrupt and the amount paid by such stockholders pay the creditors' claim in full.

AUTHORITIES

Williams vs. United States Fidelity Company, 236 U. S. 549.

In Re: *Heyman* 95 Fed. 800.

In Re: *Manhattan Brush Manufacturing Company,* 209 Fed. 997.

Phillips vs. Dreher Shoe Company, 112 Fed. 404.

Under the reasoning and authorities hereinabove set forth, Appellants respectfully contend that Horace P. Hoefer, Peter Davidson and Catherine Davidson, did not have provable claims in bankruptcy against the alleged bankrupt corporation.

The Appellants further contend that Section 322a of the Civil Code of the State of California, under which statutory authority the claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, arise, is unconstitutional, and that the said Horace P. Hoefer and Peter Davidson and Catherine Davidson have not a creditors' claim of any kind against Mortgage Securities Inc. of Santa Barbara, the alleged bankrupt.

Prior to the repeal of Section 322 of the Civil Code of the State of California in 1931, each stockholder of a corporation was, under the terms of such said Section, individually and personally liable for such proportion of its debts and liabilities incurred while he was a stockholder as the amount of stock owned by him bore to the whole of the subscribed stock of the corporation.

It follows, therefore, that prior to the repeal of Section 322 of the Civil Code, each creditor of a corporation had recourse directly against the corporation for the collection of his obligation, and also had recourse against the stockholders of the corporation for payment of their proportionate share of the obligation against the corporation. In the instant case, under the laws as they existed at the time the obligations of the County National Bank and Trust Company of Santa Barbara and the First National Trust and Savings Bank of Santa Barbara were incurred by Mortgage Securities Inc. of Santa Barbara, the said Banks had a right of recourse both against the Corporation and against its stockholders. The right of these creditors had vested in them under the statutes in force at the time the obligations were incurred and remained vested in them until the enactment of Section 322a of the Civil Code of the State of California in 1931.

Prior to the enactment of Section 322a of the Civil Code of the State of California in 1931, a stockholder who paid a statutory stockholders' liability had no recourse against the corporation for repayment.

AUTHORITIES

Volume 6a, Cal. Juris., pages 1023 and 1024, and cases cited.

By the terms of Section 322a of the Civil Code of the State of California, enacted in 1931, such stockholders become, upon payment of their stockholders' liability, subrogated to a portion of the creditors' claim against the

corporation in proportion to the amount of such creditors' claim paid by such stckholders.

It follows, therefore, that if Section 322a of the Civil Code of the State of California is constitutional and operative as against the general creditors of an insolvent corporation, and allows a stockholder to be subrogated to a portion of a creditors' claim against a corporation when the stockholder pays his proportionate liability on such claim, in the instant case the two petitioning creditors, Horace P. Hoefer and Peter Davidson and Catherine Davidson, would be subrogated to a portion of the claim of such said Banks against the Mortgage Securities Inc. of Santa Barbara. The practical effect of such subrogation would be to allow the subrogated claimants to share in the assets of the Corporation prior to the time the said Banks had received full payment of their claims. In turn, the practical effect of allowing such subrogated creditors to share in the assets of the bankrupt estate before the claims of the said Banks had been paid in full, would be to take from such said Banks the rights which had vested in them prior to the enactment of Section 322a of the Civil Code of the State of California, being the right of recourse against all the assets of the Corporation bankrupt ahead of any right or claim of a stockholder who had paid a proportionate stockholders' liability. The effect would be the same as would exist if pro tanto subrogation were allowable. As is stated in the case of *Columbia Finance and Trust Company vs. Kentucky Union Railroad Company,* 6 Fed. 794, at 796, "If the surety upon making a partial payment, became entitled

to subrogation pro tanto and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and the surety. Such a result would be grossly inequitable."

Accordingly, petitioner contends that Section 322a of the Civil Code, unless it is to be construed to give a subrogated stockholder only the right usually accorded to a surety who is partially subrogated to a creditors' claim, is unconstitutional as against a general creditor of an insolvent corporation, in that it infringes upon and impairs rights which had vested at the time of its enactment, and in that it is violative of the due process clauses and of the contract and ex post facto clauses of the Constitutions of the United States and the State of California.

AUTHORITIES

Constitution of the United States—Amendment 14.

Constitution of the United States—Article 1, para. 10, Clause 1.

Constitution of California, Article 1, paragraphs 13 and 16.

In conclusion, with respect to this particular point, Appellants contend that the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine

Davidson do not constitute provable claims in bankruptcy, and that the original involuntary petition in bankruptcy, predicated partly upon such purported creditor claims, was insufficient on its face to give the District Court any jurisdiction to make the order of adjudication. It is respectfully submitted, therefore, that the original order of adjudication was void, and should have been vacated on motion of the Appellants.

II.

THE DISTRICT COURT COMMITTED ERROR IN REFUSING PERMISSION TO THE APPELLANTS TO INTRODUCE EVIDENCE IN SUPPORT OF THEIR PETITION TO VACATE THE ORIGINAL ADJUDICATION IN BANKRUPTCY.

The petition of the Appellants for an order vacating the adjudication of bankruptcy was filed in the District Court on April 20, 1939. (Transcript of Record, pages 17 to 44). An answer to this petition was filed on June 5, 1939, by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson. (Transcript of Record, pages 70 to 74). In addition thereof, George Giovanola, as Trustee in Bankruptcy appointed by the said Hugh J. Weldon, Referee in Bankruptcy, filed a motion to dismiss the petition of the Appellants for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 61 to 65). These various matters came on for hearing on May 29, 1939, before the District Court, at which

time argument was presented by all interested parties. Questions of law only were presented and argued, however, at the time of the hearing, and the petitioners were not allowd an opportunity to present any evidence in support of their petition for an order vacating the adjudication in bankruptcy. The petition of the Appellants for an order vacating the adjudication in bankruptcy was uncontraverted by the answer or pleadings on file, except as to the question of the time when the defects in the original involuntary petition in bankruptcy were brought to the attention of the Appellants. Upon this particular point, Appellants requested permission of the Court to file affidavits showing the facts with respect to the time when the defects in the involuntary petition in bankruptcy reached the attention of the Appellants, and permission to file such affidavits was refused by the Court. (Transcript of Record, pages 123 to 125).

It appears, therefore, that although the questions of law with respect to the petition of the Appellants were argued at the time of the hearing, the issues of fact raised by the pleading were not determined, and have not yet been determined. It appears, therefore, that the order denying the petition was entirely premature, that the issues of fact should be determined, and that the District Court was in error in making its order denying the petition of the Appellants prior to a hearing on the issues of fact which had been raised.

III.

THE DISTRICT COURT COMMITTED ERROR IN ENTERTAINING AND GRANTING THE MOTION OF GEORGE GIOVANOLA, TRUSTEE IN BANKRUPTCY, TO DISMISS THE PETITION OF THE APPELLANTS TO VACATE THE ORIGINAL ADJUDICATION IN BANKRUPTCY.

Subsequent to the filing by the Appellants of their motion to vacate the original adjudication of bankruptcy herein, George Giovanola, purporting to be the Trustee in Bankruptcy of Mortgage Securities Inc. of Santa Barbara, filed a motion to dismiss the petition of the Appellants. (Transcript of Record, pages 61 to 65). This motion was argued on May 29, 1939, in connection with the other matters hereinabove set forth. The motion to dismiss which was presented on behalf of the said purported Trustee raises, of course, only issues of law, if such a motion is allowable at all in proceedings of this kind. There appears to be no authority in law or by rule for such a motion to dismiss, which takes the place of a demurrer, and it is felt that the motion to dismiss was entirely out of order both for that reason, and by reason of the fact that it was made by a Trustee who was appointed under the very order of adjudication which was under attack. It is respectfully contended, therefore, that the motion to dismiss should have been disregarded, and that the District Court committed error in granting such said motion.

If however, the motion to dismiss the petition of the Appellants for an order vacating the original adjudication in bankruptcy, as such motion to dismiss was made by George Giovanola purporting to act as Trustee in Bankruptcy of the said Corporation, was proper and was properly before the Court, Appellants respectfully contend that such motion had no merit and should not have been granted.

The motion to dismiss sets forth four grounds upon which the said George Giovanola, as Trustee, requests such dismissal. (Transcript of Record, pages 61 to 65). These grounds are discussed in the order therein set forth.

(a) The first ground set forth is that it does not appear on the face of the petition for involuntary bankruptcy that the Court did not have the jurisdiction in said proceedings to make its order for adjudication. With respect to this point, a determination of whether or not the claims of Horace P. Hoefer, and Peter Davidson and Catherine Davidson, constituted provable claims in bankruptcy will be conclusive, and no further discussion of that matter is here set forth.

(b) The second ground set forth appears to be based upon the contention that the Appellants had no right to petition for the order vacating the original adjudication in bankruptcy, because such Appellants were only creditors and stockholders of the alleged bankrupt Corporation, and no damage or prejudice appears to exist as to such Appellants by reason of the original adjudication in bankruptcy.

Appellants respectfully submit that both creditors and stockholders, or either of them, may file and maintain a petition to vacate an adjudication in bankruptcy. In the instant case, J. H. McCune and Alice W. Jackson are creditors of the alleged bankrupt Corporation, with provable claims in bankruptcy. Fred D. Jackson and Alice P. Jackson are stockholders of the alleged bankrupt Corporation. Any one or more of them could, therefore file and maintain a petition for an order vacating the original adjudication in bankruptcy.

AUTHORITIES

In Re: *New York Tunnel Co.,* 166 Fed. 284.

In Re: *Free Gold Mining and Milling Co.,* 2 Fed. Supplement 118.

Hanna vs. Brictson Manufacturing Company, 2 Fed. 2nd 139.

In addition thereto, J. H. McCune, one of the Appellants, has an attachment lien on assets of the alleged bankrupt Corporation, and the questions here presented will be determinative of the validity of such attachment lien. The facts and circumstances relative to such attachment lien appear in the original involuntary petition in bankruptcy. (Transcript of Record, pages 5 to 16).

Appellants respectfully submit, therefore, that the petition of the Appellants for an order vacating the original adjudication in bankruptcy was properly brought and maintained.

(c) The last ground presented in the motion of George Giovanola, as Trustee, to dismiss the petition of

the Appellants, is that it appears that the Appellants have been guilty of laches and unreasonable delay. This same point is raised in the answer of the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, and Peter Davidson and Catherine Davidson, to the petition of the Appellants. (Transcript of Record, pages 70 to 74).

In the instant case, the Appellants contend that the question of laches is immaterial, by reason of the fact that the original adjudication in bankruptcy is void, and the original petition for involuntary bankruptcy did not confer jurisdiction upon the Court. As a consequence, the adjudication may be attacked at any time, it being the duty of the Court to inquire into the facts of jurisdiction and act accordingly. It is the duty of the Court, when it believes its jurisdiction may have been imposed upon, to inquire into the facts and act in accordance therewith. Lack of jurisdiction is a question the Court should consider whenever and wherever raised.

AUTHORITIES

In Re: *Ettinger* 76 Fed. 2nd 741.

In Re: *Columbia Real Estate Company,* 101 Fed. 965.

If, however, the question of laches becomes material in any respect, Appellants respectfully submit that it cannot be held that they have been guilty of laches in the instant case, or are estopped from petitioning for the relief sought, because:

1. No proceedings were had in the bankruptcy matter other than the election of the Trustee prior to the time

that the within petitioners presented their objection to the jurisdiction of the Court.

2. No assets have been taken into possession of the Trustee or administered in the bankruptcy proceedings.

3. No rights of third parties have intervened or accrued.

4. Timely objection was raised by the petitioners prior to the filing of the petition to vacate, by way of objection to the jurisdiction of the Court at the purported creditors' meeting.

5. The lack of jurisdiction appears on the face of the involuntary petition in bankruptcy.

With respect to the element of time which passed between the involuntary adjudication in bankruptcy and the filing of the petition of the Appellants to vacate such involuntary adjudication in bankruptcy, the facts which follow are pertinent. The involuntary petition in bankruptcy was filed on May 10, 1938. On June 1st, 1938, the involuntary adjudication in bankruptcy was made. Subsequent thereto, a purported first meeting of creditors was held on July 1st, 1938, at which meeting the said George Giovanola was purportedly elected Trustee of the estate of the said bankrupt. Subsequent to July 1st, 1938, no meeting of creditors and no other proceedings whatsoever were had in the said bankruptcy matter until the 2nd day of February, 1939, on which date the said Referee did purportedly hold an adjourned creditors' meeting for the purpose of examining witnesses. A sub-

sequent meeting was called by the Referee on February 21st, 1939. At both of the said creditors' meetings, being on February 2nd, and February 21st, 1939, the Appellants appeared and presented objection to the holding of the meetings and to any further proceedings in the matter on the ground that the involuntary petition in bankruptcy was insufficient on its face to give the Court jurisdiction. At both of such meetings, the Appellants notified the Referee in Bankruptcy and the Appellees that a petition would be prepared and presented to the Court asking that the original involuntary petition in bankruptcy be vacated.

During all of such period of time, the said Trustee in Bankruptcy had not at any time taken possession of or had in his possession any assets of the alleged bankrupt, and no proceedings of any kind whatsoever or at all had taken place.

The Appellants had no knowledge of the form or contents of the said involuntary petition in bankruptcy until approximately eight months after the filing of the same. Upon obtaining such knowledge, proper objection to the jurisdiction of the Court was made at the first opportunity, and the petition of the Appellants to vacate such adjudication in bankruptcy was filed after the objection of the Appellants to the jurisdiction of the Court had been overruled by the Referee.

All of these various facts appear in the "Petition for Order Vacating Adjudication for Bankruptcy" of the

Appellants, and in the other documents appearing in the record. (Transcript of Record, pages 17 to 44).

It has been held in numerous cases that a motion to vacate an adjudication of bankruptcy must be made promptly. Such a rule appears founded on the doctrine of laches and estoppel, and, in nearly every instance, in reported cases where a petition to vacate an adjudication has been denied for delay in acting, some element of damage, changed condition, acquiesence, acceptance of benefit, etc., has existed. In the instant case such a rule is clearly not applicable. In order to obtain the benefit of the doctrine of laches and estoppel, it must appear that some damage has resulted, or that there has been a change of condition due to such delay, or that there has been an acceptance of benefit. None of these conditions exist in the instant case. The purported Trustee did not at any time or ever have any assets of the alleged bankrupt in his possession; no proceedings whatsoever took place in the bankruptcy action prior to the time that the Appellants asserted their objection to the proceedings; no element of damage or changed condition is present; and the Appellants are not chargeable with having accepted any benefits of the bankruptcy proceedings. Appellants respectfully contend, that even if the doctrine of laches and estoppel could be applicable in the instant case, the circumstances and conditions which appear preclude a denial of the petition of the Appellants for an order vacating the adjudication in bankruptcy.

In the case of In Re: *Ettinger,* 76 Fed. 2nd. 741, a voluntary adjudication in bankruptcy had been made in

August, 1932. In January, 1933, a creditor filed his proof of claim, and in August, 1933, the same creditor moved to vacate the adjudication in bankruptcy. The Trial Court denied the motion, upon the theory that the creditor had recognized the bankruptcy proceedings by a participation therein, had filed a claim therein, and that other rights had interevened during the course of the delay. The Appellate Court reversed the order, holding that it was the duty of the Court when it believes its jurisdiction may have been imposed upon to inquire into the facts and act in accordance therewith. The Appellate Court directly held that lack of jurisdiction was a question the Court should consider wherever and whenever made.

In the case of In Re: *Shell Metal Products Inc.,* 19 Fed. Supplement, 785, an involuntary adjudication had been made, and a motion to vacate the adjudication was denied. The Court held that where a creditor moved to vacate an adjudication on grounds other than those touching the jurisdiction of the Court to make the adjudication, he must make a plausible showing of defenses to the petition and must furnish excuses for not appearing within the statutory time. In the instant case, let it be remembered that the ground upon which the motion to vacate the adjudication was made, directly challenged the jurisdiction of the Court, and Appellants respectfully contend that in such an instance, the doctrine of laches and estoppel do not and cannot preclude the Appellants from the relief sought.

"B"

ARGUMENT ON THE APPEAL FROM THE ORDER OF THE DISTRICT COURT ALLOWING THE INTERVENTION OF THOMAS J. SMITHERAM, E. W. SQUIER, AND J. F. GOUX, AND JOINING THE INTERVENORS IN THE ORIGINAL INVOLUNTARY PETITION IN BANKRUPTCY.

I.

THE DISTRICT COURT COMMITTED ERROR IN GRANTING THE PETITION OF THOMAS J. SMITHERAM, E. W. SQUIER, AND J. F. GOUX, FOR LEAVE TO INTERVENE AND BE JOINED AS PETITIONING CREDITORS IN THE ORIGINAL INVOLUNTARY PETITION, IN THAT AN INVOLUNTARY ADJUDICATION IN BANKRUPTCY HAD ALREADY BEEN MADE AND HAD NOT BEEN VACATED, AND IN THAT THE ORIGINAL INVOLUNTARY PETITION IN BANKRUPTCY WAS INSUFFICIENT ON ITS FACE TO GIVE THE SAID DISTRICT COURT ANY JURISDICTION OF THE PROCEEDINGS.

In this instance, it must be remembered that an original adjudication in involuntary bankruptcy had been made upon the original petition of involuntary bankruptcy which was filed. The Appellants had also filed their petition for an order vacating and setting aside the orig-

inal adjudication in bankruptcy. Thomas J. Smitheram, E. W. Squier, and J. F. Goux thereupon filed a petition in the District Court to be allowed to intervene and to be joined as petitioning creditors in the original involuntary petition in bankruptcy upon which an adjudication had already been made.

The following authorities support the contention of the Appellants that intervening creditors may not be joined in an involuntary petition in bankruptcy after the adjudication has been made. Section 59, Subdivision f, Bankruptcy Act of 1898, did provide that creditors other than original petitioning creditors may at any time enter their appearance and join in the petition. While the language of the statute is very broad, the authorities appear to restrict the right of a creditor to intervene and join in the petition, restricting such right of intervention to the time prior to the adjudication or the dismissal.

AUTHORITIES

Canute Steamship Company vs. Pittsburgh and West Virginia Coal Company, 263 U. S. 244.

In Re: *Kootenai Motor Co. Inc.,* 41 Fed. 2nd. 399.

In Re: *Jutte and Co.,* 258 Fed. 422.

In Re: *Bedingfield,* 96 Fed. 190.

In Re: *Charlestown Light and Power Co.,* 183 Fed. 160.

In Re: *Plymouth Cordage Co.,* 135 Fed. 1000.

In Re: *Diamond Fuel Co.,* 6 Fed. 2nd. 773.

The case of *Canute Steamship Co. vs. Pittsburgh and West Virginia Coal Co.,* 263 U. S. 244, appears to be conclusive on this point, and the other authorities cited are equally in point. In the Canute Steamship case, an involuntary petition in bankruptcy had been filed which was sufficient on its face. Two other creditors joined in the involuntary petition, which was opposed by other creditors. The Supreme Court held that the filing of such a petition, sufficient on its face, gave the bankruptcy court jurisdiction of the proceedings. The Supreme Court further stated "We therefore conclude that where a petition for involuntary bankruptcy is sufficient on its face, alleging that three petitioners are creditors holding provable claims and containing all the averments essential to its maintainance, other creditors having provable claims who intervene in the proceeding and join in the petition at any time during its pendency before an adjudication is made, after as well as before the expiration of four months from the alleged act of bankruptcy, are to be counted at the hearing, etc." The Supreme Court further stated "The right thus conferred is not limited to the four month period after the commission of the act of bankruptcy alleged in the petition, either expressly or by implication; the only limitations as to the point of time being those necessarily implied, that on the one hand the petition cannot be joined in after it has been dismissed and is no longer pending, and that on the other hand, it must be joined in before the adjudication is made."

Appellants respectfully contend, therefore, that, even if the original petition in involuntary bankruptcy is sufficient on its face to allow any intervention, the intervention could not be allowed after the adjudication had been made, unless the adjudication should be vacated.

Appellants further contend, however, that the original petition in involuntary bankruptcy was insufficient on its face to give the District Court any jurisdiction whatsoever, and that for such reason additional creditors cannot be allowed to intervene to join therein. In order to allow an intervention, the original petition must be sufficient on its face. The following authorities support this rule:

AUTHORITIES

In Re: *Bedingfield,* 96 Federal, 190.
In Re: *Stein,* 130 Federal, 377.

Appellants respectfully contend, therefore, that the District Court committed error in allowing the said Thomas J. Smitheram, E. W. Squier, and J. F. Goux, to intervene and be joined in the original petition for involuntary bankruptcy.

II.

THE DISTRICT COURT COMMITTED ERROR IN GRANTING THE PETITION OF THE INERVENING CREDITORS FOR LEAVE TO INTERVENE AND BE JOINED IN THE ORIGINAL INVOLUNTARY PETITION IN BANKRUPTCY, WHEN AN ANSWER TO

THE PETITION OF THE SAID INTERVENING CREDITORS HAD BEEN FILED AND NO DETERMINATION OF THE ISSUES RAISED BY SUCH ANSWER HAD BEEN MADE.

In this connection, let it be noted that the Appellants herein filed in the said District Court an "Answer to Petition of Intervening Creditors," in answer to the said petition filed by Thomas J. Smitheram, E. W. Squier and J. F. Goux for permission to intervene and be joined as petitioning creditors. (Transcript of Record, pages 65 to 69). This answer sets forth facts showing that the Appellants were creditors and stockholders respectively of the said alleged bankrupt, and denies specifically that Thomas J. Smitheram, one of the intervening creditors, had, or at any time did have, a provable claim in bankruptcy against Mortgage Securities Inc. of Santa Barbara. The answer further denied that the said Thomas J. Smitheram at any time was qualified or competent to petition for the adjudication in bankruptcy of the said bankrupt. The answer of the Appellants further set forth the defense that the said petition of the intervening creditors failed to set forth facts upon which the relief could be granted, and failed to state sufficient facts to establish that the petitioners had provable claims in bankruptcy or were entitled to intervene in the said action. The answer of the Appellants further set forth the defense that the District Court had no jurisdiction to grant the petition of the intervening creditors in that a purported adjudication had been made and entered in the

said action, in that the involuntary petition in bankruptcy was insufficient on its face, and in that the said District Court had no jurisdiction of the proceedings.

Prior to the time that the District Court made its order granting the petition of the intervening creditors for leave to intervene and to be joined as creditors in the original involuntary petition in bankruptcy, none of the issues raised by the "Petition of Intervening Creditors" and the "Answer to Petition of Intervening Creditors" had been determined. Appellants respectfully contend that they were entitled to have the issues determined by the District Court prior to the making of the order of the District Court allowing the intervention and allowing such intervening creditors to be joined in the said original involuntary petition.

The scope of the hearing at which the petition of the said intervening creditors came before the Court was limited only to the jurisdictional facts as raised in the answer. As a consequence, numerous allegations of the petition in intervention stand denied by the verified answer, and, inasmuch as no evidence was introduced, the petition in intervention was, and is, unsupported as to the facts at issue.

In the event it was proper for the District Court to make any order in the premises, such an order should have been restricted to granting permission to the proposed interveners to intervene for the purpose of amending the original involuntary petition in bankruptcy, and the answering creditors and stockholders, being the Ap-

pellants in this instance, should have been granted time to answer the original involuntary petition in bankruptcy, as amended by the joining in of these intervening creditors, so that the issues of fact could have been determined. The Appellants are entitled to be accorded an opportunity to have such issues of fact determined either upon the answer which was filed by the Appellants to the petition for leave to intervene, or by way of an answer to the involuntary petition in bankruptcy as amended or supplemented by the intervening creditors. A trial of the issues of fact raised by the answer of the Appellants should be accorded.

The order which was signed by the District Court granted permission to the intervening creditors both to intervene and to join in the original petition in involuntary bankruptcy, but does not set aside the adjudication in bankruptcy for such purpose. If the original involuntary petition was sufficient, then the intervention is, of course, quite useless. If the original involuntary petition was insufficient, then the order of the District Court should adjudge that such said original involuntary petition was insufficient and that the original adjudication be set aside, so that the intervention of such intervening creditors could properly be made.

Appellants respectfully contend, therefore, that the order of the District Court, made before the allegations of the petition for intervention were supported by evidence as to the facts placed at issue, was premature and in error.

III.

THE DISTRICT COURT COMMITTED ERROR IN GRANTING THE SAID PETITION FOR LEAVE TO INTERVENE, IN THAT SUCH SAID PETITION FAILS TO STATE OR SET FORTH SUFFICIENT FACTS TO ESTABLISH THAT THE SAID PETITIONERS HAD PROVABLE CLAIMS IN BANKRUPTCY, AND IN THAT THE SAID PETITION FAILS TO STATE OR SET FORTH SUFFICIENT FACTS UPON WHICH AN INTERVENTION COULD BE GRANTED.

In this connection it is to be noted that the petition of the said intervening creditors, insofar as the purported creditor claim of E. W. Squier and J. F. Goux is concerned, merely sets forth that the said E. W. Squier and J. F. Goux had filed a proof and claim of unsecured debt with the Referee in Bankruptcy, there being a copy of such claim attached to the petition. The petition thereupon alleges as a conclusion of law that such claim was and is a provable claim in bankruptcy. The same situation exists as to the claim of Thomas J. Smitheram. (Transcript of Record, pages 44 to 58).

The answer of the Appellants questions the sufficiency of the petition as a matter of law in this respect. It is the contention of the Appellants that the existence of provable claims in bankruptcy should be alleged by alleging and setting forth in detail the facts upon which the claims are founded, and that a mere allegation of a con-

clusion of law that the creditors hold provable claims in bankruptcy is not sufficient.

Appellants respectfully contend, therefore, that the "Petition of Intervening Creditors" did not state or set forth facts sufficient to allow an intervention, especially in view of the answer of the Appellants which raised these specific points of fact and law.

CONCLUSION.

In conclusion, Appellants again respectfully submit that for the reasons above stated the original adjudication of involuntary bankruptcy was void and that the District Court committed error in refusing to vacate such adjudication in bankruptcy; in refusing to allow Appellants to introduce evidence in support of their petition; and in entertaining and granting the motion of the purported Trustee in Bankruptcy to dismiss such said petition.

With respect to the order of the District Court granting the petition for intervention and allowing such intervening creditors to join in the original petition in involuntary bankruptcy, Appellants respectfully submit that such intervention and joining was not allowable, in that the original petition for involuntary bankruptcy was not sufficient on its fact to confer jurisdiction; and in that an adjudication has already been made. Appellants further submit that the District Court committed error in granting such petition for intervention prior to the determination of the issues of fact and law presented in connection therewith; and in granting such petition over

the objection of the Appellants while said petition did not state facts sufficient to allow an intervention.

As hereinabove stated, the petition of Appellants for an order vacating the original adjudication in bankruptcy, the motion of the said Trustee to dismiss such said petition, and the motion of the intervening creditors for permission to intervene and join in the original petition for involuntary bankruptcy, were heard and argued together. On June 27th, 1939, the District Court made its "Memorandum Of Order" granting the petition for intervention, denying the petition of Appellants to vacate the original adjudication, and granting the motion of the said Trustee to dismiss the petition of Appellants on all grounds set forth in the motion to dismiss. (Transcript of Record, page 75).

This "Memorandum Of Order" is of a 'shotgun' type, apparently designed to support the bankruptcy proceedings on all possible grounds. It is, however, of little practical value in determining the points which were involved and which must be decided in order to give the District Court, the Referee in Bankruptcy, and all interested parties, any benefit therefrom, and in order to provide proper authority for the points in question. Unless there is a direct ruling on the said points of law involved, such said points will be necessarily brought up in further proceedings in the same bankruptcy litigation, so that they may be specifically determined.

It is impossible to determine from the orders of the District Court whether or not such District Court de-

termined the original petition in involuntary bankruptcy to be sufficient on its face to confer jurisdiction, or whether the said District Court intended first to allow the intervention and then to uphold the proceedings upon the theory that the intervention cured any defects in the original petition. It could be concluded that the District Court felt that the original petition for involuntary bankruptcy was insufficient, otherwise there would obviously have been no need to grant the petition in intervention. On the other hand, if the District Court had felt that the original petition for involuntary bankruptcy was insufficient, it would appear that the original adjudication should have been vacated, and the intervention then allowed.

Further too, the order of the District Court denies the petition of the Appellants and thereupon also grants the motion of the said Trustee to dismiss such petition. Obviously, if the petition of the Appellants had been denied, it was not necessary or proper to also dismiss such petition. Further too, it is impossible to determine from the order whether or not the petition of Appellants was denied because the original petition for involuntary bankruptcy was sufficient to confer jurisdiction, or whether such petition was denied upon some other ground set forth in the motion to dismiss.

It is very material and important that these various points be clarified. For instance, it cannot be ascertained from the orders whether or not the subrogation claims of Horace P. Hoefer and Peter Davidson and Catherine

Davidson are held to be provable claims in bankruptcy. Unless this point is determined, it must arise again in the bankruptcy proceedings when such claims are to be allowed or disallowed, and the present proceedings which were relied upon to determine this point offer no precedent. Again as a practical matter, it must be determined whether the original petition in involuntary bankruptcy was held sufficient or whether such petition as joined in by the intervening creditors was held to be sufficient. In the one instance, title to property and displacement of liens dates back to the filing of the original petition in involuntary bankruptcy, and in the other instance the Appellants take the position that title to property and displacement of liens dates from the date of intervention, as being the date the proceedings actually acquired their validity. This point must be determined in this appeal, else it will again rise in the same bankruptcy proceedings with no precedent being established herein.

Appellants respectfully submit, therefore, that the orders of the District Court should be reversed, and that the points herein raised should be definitely determined by this Court.

Respectfully submitted,

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No. 9270

In the United States Circuit Court of Appeals for the Ninth Circuit

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, and GEORGE GIOVANOLA, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees.

Appellees' Reply Brief

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TOPICAL INDEX

Page

Additional Statement of Facts 2

"A"

Points and Argument of the Appellees on the Appeal From the Order of the District Court Denying the Petition of the Appellants for an Order Vacating the Adjudication in Bankruptcy 4

I.

The Claims of Horace P. Hoefer, Peter Davidson and Catherine Davidson Constituted Provable Claims and Were Not Claims Founded Upon an Unconstitutional Statutory Provision 4

Authorities 6

(b) The status of a stockholder is not that of a surety for the corporation. The liability of the stockholder for the corporation's debts is primary and independent, and that of a principal debtor 6

Authorities 6

(c) The right given to the stockholder who has paid his proportionate share of liability under section 322a is fixed by statute 6

Authorities 7

(d) The subrogation of the stockholder by virtue of 322a would work no unjust payment out of the assets of the insolvent corporation as between the creditor and the stockholder 7

Authorities 9

Page

II.

Section 322a is Constitutional 9
Authority 9

III.

The Appellants Were Guilty of Laches by Their Failure to Attack the Order of Adjudication for Almost Ten Months 10
Authorities 10
Authorities 11

IV.

The Only Person Who May Move to Vacate an Adjudication Is One Who Has a Subsisting Interest That May be Adversely Affected 11
Authority 12

V.

The Creditors, Thomas J. Smitheram, E. W. Squier and J. F. Goux Could at Any Time Intervene and Join in the Petition for Involuntary Bankruptcy 12
Authorities 14

TABLE OF CASES AND AUTHORITIES CITED

Page

Abbott Wauchuela Mfg. & Timber Co., 240 F. 938 10
Alexander v. Farmer's Supply Co., 275 F. 824 11
Bank of Mobile v. Zadek, 84 So. 715, 203 Ala. 518 7
Canute Steamship Co. v. Pitts. & W. Virginia Coal Co., 263 U. S. 244, 44 S. Ct. 67, 68 L. Ed. 287 14
Chandler Act, Sec. 59, subd. (f) 12
Civil Code, Sec. 322a 5, 6, 8
Dight v. Chapman, 44 Ore. 265; 75 Pac. 585 7
Erickson v. Richardson, 86 F. (2d) 963 6
In re Bennett Shoe Co., 162 F. 691 7
In re Bolognesi, 223 F. 771 14
In re Brown, 164 F. 673 6
In re Jemison Mercantile Co., 112 F. 966 14
In re Koenig, etc., 127 F. 891 14
In re Peerless Shoe Co., 226 F. 1020 7
In re Remington Automobile & Motor Co., 119 F. 441 6
In re Salvator Brewing Co., 193 F. 989 9
In re Shell Metal Products, 19 F. Supp. 785 10
In re Vastbinder, 126 F. 417 14
In re Walker, 164 F. 680 6
In re Worsham, 142 F. 121 11
Kaysser v. McNaughton, 57 Pac. (2d) 927; 6 Cal. (2d) 248 6
Mason v. Dean, 31 F. (2d) 945 11
Morrow v. Superior Court, 64 Cal. 383; 1 Pac. 354 6

Page

Nielson v. Crawford, 52 Cal. 248 6
Patek v. California Cotton Mills, 4 Cal. App. (2d) 12, 40 Pac. (2d) 927 9
Remington on Bankruptcy, Vol. 1, Sec. 233 and Sec. 234 14
Sonoma Valley Bk. v. Hill, 59 Cal. 107 6
Sauve v. Fleschutz, 219 F. 542 9
Trindade v. Atwater Canning Co., 128 Pac. 756 6

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Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees.

No. 9270

Appellees' Reply Brief

ADDITIONAL STATEMENT OF FACTS

In the motion to dismiss the proceedings to set aside the order of adjudication and in the answer to the application to set aside the order of adjudication, the point was raised that it appeared that the order of adjudication was duly and regularly made on the 1st day of June, 1938, and the proceedings referred to Hugh J. Weldon, one of the Referees in Bankruptcy at his office at Number 15 West Carrillo Street, Santa Barbara, California, and thereafter at a meeting of the creditors of said bankrupt the said George Giovanola was elected and appointed trustee in bankruptcy of the estate of said bankrupt; that until the 20th day of April, 1939, the petitioners, J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson, were guilty of laches and unreasonable delay in failing to make their application questioning the validity of the order of adjudication. (Transcript of Record, pp. 61-65, pp. 70-74.)

Further, that it appears from the record (Transcript of Record, pp. 24-27) itself that the said J. H. McCune claims to be an assignee of the County National Bank and Trust Company of Santa Barbara of an alleged claim of said County National Bank and Trust Company of Santa Barbara against said bankrupt evidenced by certain promissory notes executed by said bankrupt to said bank; that Alice W. Jackson claims to be the assignee of a certain alleged claim of Winsor Soule against said bankrupt evidenced by a promissory note alleged to have been made by said bankrupt to the said Winsor Soule and that the claim of Fred D. Jack-

son and Alice P. Jackson is founded upon their ownership of certain preferred and common stock of the bankrupt corporation and that these petitioning creditors have not been prejudiced or damaged by said order of adjudication, and that the latter two have no interest in the matter.

The motion to dismiss further sets forth the ground that said petition to set aside the order of adjudication did not state facts sufficient to constitute grounds for vacating the order of adjudication because it did not appear on the face of the petition for involuntary bankruptcy that the Court did not have jurisdiction of said proceedings and to make its order for adjudication. The petition of Thomas J. Smitheram, E. W. Squier and J. F. Goux to intervene as petitioning creditors for the adjudication of said Mortgage Securities, Inc., of Santa Barbara as a bankrupt and to supplement the creditors named in said original petition set forth as exhibits to said petition their respective provable claims in bankruptcy. The claim of E. W. Squier and J. F. Goux annexed as Exhibit "A" to said last mentioned petition is founded upon legal services rendered by said claimants as attorneys for said bankrupt. The claim of Thomas J. Smitheram annexed as Exhibit "B" to said last mentioned petition is founded upon a deposit of money made with said bankrupt for the purchase of first mortgage certificates which were never delivered. These claims on their face appear to be valid, legal and provable claims in bankruptcy. (Transcript of Record, pp. 49-59.)

The question as to whether said intervening creditors had the right to petition and whether the Court had the power to permit them to file said petition and order them joined as petitioners for the adjudication of said Mortgage Securities, Inc., of Santa Barbara as a bankrupt will be discussed later in this brief. And if it appears that the original creditors were not disqualified as creditors in filing their petition for the adjudication then it will not become necessary for this Court to determine the rights of the intervening creditors except insofar as their right should be preserved in the event of any subsequent attack that may be made upon said order of adjudication.

"A"

POINTS AND ARGUMENT OF THE APPELLEES ON THE APPEAL FROM THE ORDER OF THE DISTRICT COURT DENYING THE PETITION OF THE APPELLANTS FOR AN ORDER VACATING THE ADJUDICATION IN BANKRUPTCY.

I.

The Claims of Horace P. Hoefer, Peter Davidson and Catherine Davidson Constituted Provable Claims and Were Not Claims Founded Upon an Unconstitutional Statutory Provision.

(a) The said claims of Horace P. Hoefer, Peter Davidson and Catherine Davidson originated in their

respective stockholders liability and in payment thereon in an action brought by the First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara, against the stockholders of said bankrupt founded upon promissory notes executed by said bankrupt to said banks, and the claims of said creditors are founded on contract.

The said creditors, Horace P. Hoefer, Peter Davidson and Catherine Davidson paid to the First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara their respective shares of their liability on a judgment obtained by said banks against them for their stockholders liability under the law of the State of California as it then existed. Upon that payment and under Section 322a of the Civil Code they had a direct and separate right of action against the said bankrupt, to recover the amount of their respective payments. Section 322a states that such creditor "shall be subrogated to the extent of such payment to the claim of the creditor against the corporation." Having a direct and primary right of action against the corporation said creditor has a provable and valid claim in bankruptcy against the corporation.

The obligation of the stockholder to pay his proportionate share of the debt of the corporation to a creditor is founded upon contract.

AUTHORITIES

Erickson v. Richardson, 86 F. (2d) 963;

Kaysser v. McNaughton, 57 Pac. (2d) 927; 6 Cal. (2d) 248;

In re Walker, 164 F. 680;

In re Brown, 164F, 673;

In re Remington Automobile & Motor Co., 119 F. 441.

(b) The status of a stockholder is not that of a surety for the corporation. The liability of the stockholder for the corporation's debts is primary and independent, and that of a principal debtor.

AUTHORITIES

Kaysser v. McNaughton cited, supra;

Trindade v. Atwater Canning Co., 128 Pac. 756;

Morrow v. Superior Court, 64 Cal. 383; 1 Pac. 354;

Nielson v. Crawford, 52 Cal. 248;

Sonoma Valley Bk. v. Hill, 59 Cal. 107.

(c) The right given to the stockholder who has paid his proportionate share of liability under section 322a is fixed by statute.

When a stockholder has paid his liability to a creditor he is discharged of his statutory liability and prior to the enactment of Section 322a he had no cause of action under the common law or by statute for reimbursement against the corporation. His payment likewise

discharges the debt of the creditor *pro tanto* against the corporation and by such payment the stockholder has a direct claim against the corporation for that portion of the debt.

AUTHORITIES

Dight v. Chapman, 44 Ore. 265; 75 Pac. 585;
In re Peerless Shoe Co., 226 F. 1020;
In re Bennett Shoe Co., 162 F. 691;
Bank of Mobile v. Zadek, 84 So. 715, 203 Ala. 518.

(d) The subrogation of the stockholder by virtue of 322a would work no unjust payment out of the assets of the insolvent corporation as between the creditor and the stockholder.

There is no relation of suretyship between a stockholder and the corporation and hence the case cited by counsel of a guarantor being placed upon an equal footing with a creditor as against the insolvent debtor is wholly beside the point. The creditor holding the claim against the insolvent corporation having received part of the payment of his debt could make claim for no more than the unpaid portion thereof as against the bankrupt corporation and would have to set forth the credit by way of payment made by the stockholder. The stockholder has a claim for so much of the debt that he has paid and the aggregate would amount, of course, to the total claim in the first instance and no

disproportionate distribution could be made of the assets of the bankrupt corporation because the creditor on the one hand could obtain no more than what would be due him for his unpaid balance and the stockholder on the other hand no more than what would be due him for the amount paid on the debt, and the same proportion of the assets would be paid as though the creditor had filed a claim for the full amount of his debt.

Counsel's reasoning that "the practical effect of allowing such subrogated creditors to share in the assets of the bankrupt estate before the claims of said banks had been paid in full, would be to take from said banks the rights which had vested in them prior to the enactment of Section 322a of the Civil Code of the State of California, being the right of recourse against all the assets of the corporation ahead of any right or claim of a stockholder who had paid a proportionate stockholder's liability," overlooks the fact that said banks have already been paid by the stockholders a part of their claims and have reduced the indebetdness of the corporation to said banks in the same proportion and that regardless of Section 322a the banks still have the right to have recourse against the assets of the corporation for their reduced claim and still have the same right to share proportionately in the assets of the corporation along with the stockholder who has already paid his proportion of the debt. There is no reason in justice or in equity why a creditor should have recourse for the full amount of his claim in and

to the assets of the corporation when he has received the benefit of part payment and deny the stockholder his right to recourse against the assets of the corporation for the benefit conferred by virtue of the amount that the latter has paid.

If the stockholder can be classed as a surety for the corporation and has paid part of his principal's debt, under the law he could have his claim against the bankrupt corporation.

AUTHORITIES

Sauve v. Fleschutz, 219 F. 542;
In re Salvator Brewing Co., 193 F. 989.

II.

Section 322a Is Constitutional.

The Section provides that the stockholder paying the corporation's debt because of statutory proportionate stockholder's liability shall be subrogated to the claim of the creditor against the corporation is not unconstitutional as impairing the obligation of contract between creditor and corporation or between stockholders themselves nor does the section violate any constitutional provision against restrospective legislation.

AUTHORITY

Patek v. California Cotton Mills, 4 Cal. App. (2d) 12, 40 Pac. (2d) 927.

III.

The Appellants Were Guilty of Laches by Their Failure to Attack the Order of Adjudication for Almost Ten Months.

A creditor moving to set aside an order of adjudication must make a plausible showing to the petition on the merits and must also furnish excusable explanation for not interposing the defenses in regular course within the time fixed by the bankruptcy. The burden was upon the petitioners to show in their petition facts sufficient to excuse the unreasonable delay in attacking the adjudication.

AUTHORITIES

In re Shell Metal Products, 19 F. Supp. 785;
Abbott Wauchuela Mfg. & Timber Co., 240 F. 938.

Laches may bar the objector's right to vacate the adjudication where lack of jurisdiction does not appear on the face of the proceeding. Jurisdiction attaches when the petitioners for the adjudication show they have "provable claims." As has been already stated the claims of the stockholders were not only "provable," but were "allowable." Hence no other jurisdictional defect appearing on the face of the record, the objecting petitioners have lost all right to attack the adjudication not only because of their failure to appear

within the statutory time and object but within a reasonable time thereafter.

AUTHORITIES

Mason v. Dean, 31 F. (2d) 945;
In re Worsham, 142 F. 121;
Alexander v. Farmer's Supply Co., 275 F. 824.

The petition of the objectors to the adjudication showing no sufficient excuse for delay, the District Court did not commit any error to refuse evidence to be introduced on the subject. At least, it is presumed that petitioners made out their strongest case for such excuse, which was merely that they had made certain objections before the Referee but apparently took no appeal from his adverse rulings.

IV.

The Only Person Who May Move to Vacate an Adjudication Is One Who Has a Subsisting Interest That May be Adversely Affected.

The petitioners, Fred D. Jackson and Alice P. Jackson base their right to attack on the fact that they are stockholders of the Mortgage Securities, Inc., of Santa Barbara. This appears on the face of their petition. Obviously they are rank outsiders unless they allege that they are injuriously affected by the adjudication, which they have not done.

The petitioners, J. H. McCune and Alice W. Jackson, are assignees of claims against the bankrupt but it nowhere appears that the adjudication will not benefit them. The corporation is admittedly insolvent, and the assets to be marshaled will be for the benefit of all creditors including petitioners. It is, therefore, to their advantage to allow the adjudication to stand. A creditor must show a benefit to him by vacating the adjudication. This petitioners have failed to do.

AUTHORITY

Abbott v. Wauchuela Mfg. Co., (cited supra).

V.

The Creditors, Thomas J. Smitheram, E. W. Squier and J. F. Goux Could at Any Time Intervene and Join in the Petition for Involuntary Bankruptcy.

While it may be a matter of discretion for the Court to permit such intervention, its power to do so under the Bankruptcy Act cannot be questioned.

Section 59, Subdivision (f) of the Chandler Act, which is substantially the same as it appeared in the Bankruptcy Act provides:

> "Creditors other than the original petitioners may *at any time* enter their appearance and join in the petition." (Italics, the writer's.)

It will be noted that the words "at any time" would give petitioners in intervention the right to appear

before an actual dismissal of the proceedings had taken place. In the proceedings filed by the petitioners to vacate the adjudication it is conceded that the order of adjudication has been made upon a petition filed in involuntary proceedings, and that the Court until the proceedings are dismissed has at least jurisdiction to test the validity of its own order of adjudication, and if the objecting petitioners have a right to attack such order other creditors should have the equal right to supplement any disqualified petitioning creditors. Furthermore, assuming that the Court should vacate the order of adjudication because of disqualified petitioning creditors the proceedings would then be in the same condition as before adjudication and the involuntary bankruptcy proceedings would still be pending, and the Court would be in exactly the same position as in the case where within the time allowed by statute, formal objections were filed before the hearing of the petition. In other words, the vacating of the order of adjudication would still leave the original petition in involuntary bankruptcy still pending and before it could be dismissed these petitioners on proper notice and motion, should have the right to join therein.

The words "at any time" are obviously not to be taken in an absolutely unlimited sense; there must at least be a petition pending before the Court, but creditors may join after the expiration of four months in order to make up the requisite number, even though the original creditors had no provable claims, or were insufficient in number, or had subsequently withdrawn.

Where the original petition was *formerly* sufficient, was in fact invalid because of the disqualification of some one or more of the petitioning creditors, nevertheless the original petition should be validated as of the commencement of the proceedings by the joinder of valid creditors, by subsequent intervening petition *filed before dismissal of the original* thereof even if such intervening joining petition is filed more than four months after the commission of the act of bankruptcy complained of.

And in this case this right of intervening creditors should be protected since the objecting creditors by their own laches and unreasonable delay have lulled other qualified creditors in a sense of security as to the validity of the adjudication and also barred said intervening creditors from any opportunity to intervene prior to adjudication and until the objection was raised at a time some ten months later.

AUTHORITIES

Remington on Bankruptcy, Vol. 1, Sec. 233 and Sec. 234;

In re Jemison Mercantile Co., 112 F. 966;

In re Koenig etc., 127 F. 891;

In re Bolognesi, 223 F. 771;

In re Vastbinder, 126 F. 417;

Canute Steamship Co. v. Pitts. & W. Virginia Coal Co., 263 U. S. 244, 44 S. Ct. 67, 68 L. Ed. 287.

It was not error of the District Court to refuse to receive evidence on the issues raised by the answer in that the District Court did not have to pass upon the allowability of Smitheram's claim since a creditor to qualify as a petitioner need only show that he had a provable claim and these facts appear on the face of the petition and the record does not show that the offer of proof would affect the provability of his claim.

Respectfully submitted,

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No. 9270

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, and GEORGE GIOVANOLA, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees.

APPELLANT'S REPLY BRIEF

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

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SUBJECT INDEX

Page

I.

The Appellants, as Creditors and Stockholders of Mortgage Securities, Inc. of Santa Barbara, are proper parties to present the motion to vacate the adjudication in bankruptcy..... 2

II.

The purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson did not constitute provable claims in bankruptcy, which fact appeared from the face of the involuntary petition. This is by reason of the fact that such claims are subrogation claims to only a portion of a larger claim, and by reason of the fact that Section 322a of the Civil Code of the State of California, from which statutory authority such said claims arise, is unconstitutional as to general creditors of the insolvent corporation. The original petition in bankruptcy, not being based upon provable claims in bankruptcy, was insufficient on its face to give the District Court any jurisdiction, and the order of adjudication was void. 5

III.

The Appellants were not guilty of laches, and the question of laches is immaterial. 9

IV.

Conclusion 10

TABLE OF CASES AND AUTHORITIES CITED

Pages

Civil Code of the State of California, Section 322a 5, 7, 8, 9

Hanna vs. Brictson Mfg. Co., 62 Fed. 2nd 139 3

In Re: Bedingfield, 96 Fed. 190 4

In Re: Columbia Real Estate Company, 101 Fed. 965 10

In Re: Ettinger, 76 Fed. 2nd 741 10

In Re: Free Gold Mining and Milling Company, 2 Fed. Supp. 118 3

In Re: Harris, 299 Fed. 395 4

In Re: New York Tunnel Company, 166 Fed. 284 ..... 3, 5

In Re: Stein, 130 Fed. 377 4

Manning vs. Evans, 156 Fed. 106 4

Patek vs. California Cotton Mills, 4 Cal. App. 2nd 12 8

Pranta vs. Reich Company, 77 Fed. 2nd 888 4

Robinson vs. Hanway, Fed. Case 11953 4

Winchester vs. Howard, 136 Cal. 432 6

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Appellees.

APPELLANT'S REPLY BRIEF

The position and contentions of the Appellants are quite fully set forth in the "Appellants' Opening Brief" which is on file herein. The points and authorities therein set forth will not be here discussed except insofar as necessary to meet any of the arguments and authorities submitted by the Appellees in their brief. A few points

and arguments have been submitted by the Appellees which were not discussed in the "Appellants' Opening Brief," and this reply brief will be devoted principally to a short discussion of such matters.

I.

THE APPELLANTS, AS CREDITORS AND STOCKHOLDERS OF MORTGAGE SECURITIES INC. OF SANTA BARBARA, ARE PROPER PARTIES TO PRESENT THE MOTION TO VACATE THE ADJUDICATION IN BANKRUPTCY.

The Appellees have stated in their Reply Brief that the Appellants, as such stockholders and creditors, have not been prejudiced or damaged by the original adjudication in bankruptcy. Appellees further advance the proposition that the only persons who may move to vacate an adjudication in bankruptcy are persons who have a subsisting interest which may be adversely affected.

It is conceded that J. H. McCune and Alice W. Jackson, Appellants, are creditors of the said Mortgage Securities Inc. of Santa Barbara, and that Fred D. Jackson and Alice P. Jackson, Appellants, are stockholders of Mortgage Securities Inc. of Santa Barbara. The following authorities uphold the right of creditors and stockholders to attack an adjudication in bankruptcy:

AUTHORITIES

In Re: *New York Tunnel Company,* 166 Fed. 284.

Matter of *Free Gold Mining and Milling Company,* 2 Fed. Supp. 118.

Hanna vs. Brictson Mfg. Co., 62 Fed. 2nd 139.

While the Appellants do not concede that it is necessary in order to attack the adjudication in bankruptcy that the Appellants show that they have been, or will be, prejudiced thereby, nevertheless the record shows that the property rights of J. H. McCune, one of the Appellants, have been, or will be, materially affected by the adjudication in bankruptcy. The record shows that J. H. McCune, in two actions pending in the Superior Court of Santa Barbara County, obtained during the period from January 7, to January 12, 1938, attachment liens against real and personal property of Mortgage Securities Inc. of Santa Barbara. (Transcript of Record, pages 7 to 13). As a matter of fact, such attachment liens are made the basis of the original petition in involuntary bankruptcy filed herein, and such petition in involuntary bankruptcy was filed just within four months of the time such liens were obtained, and was obviously filed for the purpose of avoiding such liens.

For the purpose of determining whether or not these attachment liens are avoided by the adjudication in bankruptcy herein, it becomes very material to ascertain the date from which the adjudication in bankruptcy became effective for such purpose. Ordinarily an adjudication

in bankruptcy relates back to the filing of the original petition in bankruptcy, the effect of which is to avoid liens acquired within four months of the date of the filing of such original petition. This rule is predicated, however, upon the premise that the original petition in bankruptcy is sufficient on its face to give jurisdiction. In the event the original petition in bankruptcy is insufficient on its face to give jurisdiction, then the date to which an adjudication in bankruptcy relates for the purpose of avoiding such liens is the date when such original petition in bankruptcy is made sufficient by intervention or otherwise.

The following authorities support this proposition:

AUTHORITIES

Pranta vs. Reich Company, 77 Fed. 2nd 888.
In Re: *Stein,* 130 Fed. 377.
Manning vs. Evans, 156 Fed. 106.
In Re: *Bedingfield,* 96 Fed. 190.
In Re: *Harris,* 299 Fed. 395.
Robinson vs. Hanway, Fed. Case 11953.

It follows, therefore, that the Appellants, especially Appellant J. H. McCune, has a vital interest in the question as to whether or not the original petition in involuntary bankruptcy was sufficient on its face to give jurisdiction, and as to whether or not the original adjudication in bankruptcy should be vacated. If the original petition was insufficient, then the adjudication in bank-

ruptcy should relate only to the time it became sufficient by intervention, if at all, and in such an event the attachment liens of Appellant J. H. McCune are not avoided by the bankruptcy proceedings, as more than four months will have elapsed from the date of such liens to the date the involuntary bankruptcy proceedings became sufficient by proper intervention.

Further too, it is the plain duty of the Court to consider any jurisdictional defects which might make an adjudication void. (In Re: *New York Tunnel Company,* 106 Fed. 284).

II.

THE PURPORTED CREDITOR CLAIMS OF HORACE P. HOEFER AND PETER DAVIDSON AND CATHERINE DAVIDSON DID NOT CONSTITUTE PROVABLE CLAIMS IN BANKRUPTCY, WHICH FACT APPEARED FROM THE FACE OF THE INVOLUNTARY PETITION. THIS IS BY REASON OF THE FACT THAT SUCH CLAIMS ARE SUBROGATION CLAIMS TO ONLY A PORTION OF A LARGER CLAIM, AND BY REASON OF THE FACT THAT SECTION 322a OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, FROM WHICH STATUTORY AUTHORITY SUCH SAID CLAIMS ARISE, IS UNCONSTITUTIONAL AS TO GENERAL CREDITORS OF THE INSOLVENT CORPORATION. THE ORIGINAL

PETITION IN BANKRUPTCY, NOT BEING BASED UPON PROVABLE CLAIMS IN BANKRUPTCY, WAS INSUFFICIENT ON ITS FACE TO GIVE THE DISTRICT COURT ANY JURISDICTION, AND THE ORDER OF ADJUDICATION WAS VOID.

The Court is respectfully referred to pages 17 to 30 of "Appellants' Opening Brief" for the full discussion of these points therein contained.

Appellees make no real attempt in their reply brief to meet the arguments and authorities presented by the Appellants in connection with these points. The Appellees contend, first, that the obligation of the stockholders of Mortgage Securities Inc. of Santa Barbara to pay their proportionate share of the corporate obligations to its creditors was founded on contract. There appears to be no materiality to this point. It is conceded that such liability was founded upon the constitutional and statutory provisions of the laws of the State of California, and that such liability has been defined by the Supreme Court of California as a matter of surety, and therefore of contract. (*Winchester vs. Howard,* 136 Cal. 432). We are not here concerned, however, with the obligation of a stockholder to pay corporate obligations, but with the extent of the right of such stockholder to recover the amount of such payment from an insolvent corporation ahead of or on a par with general creditors.

Appellees then contend, second, that the liability of a stockholder for payment of corporate obligations is direct and primary. Here again, this particular argument, or the cases which purport to support it, appear not to be material. We are not here concerned with the obligation of a stockholder to pay corporate obligations, but only with the extent of the right of such stockholder to recover the amount of such payment from an insolvent corporation ahead of or on a par with general creditors.

Appellees then contend, third, that the right of a stockholder who has paid his proportionate share of his stockholder's liability to be subrogated to the creditor's claim against the corporation is fixed by statute. Here again, there appears to be no question or dispute. It is conceded that prior to the enactment of Section 322a of the Civil Code of the State of California a stockholder who had paid his proportionate share of his stockholder's liability had no cause of action against the corporation for reimbursement. Section 322a of the Civil Code of the State of California purports to give such stockholders a right of subrogation to the portion of the creditor's claim against the corporation which the said stockholders have paid. This right, if constitutional, is undoubtedly fixed by statute. The authorities cited by Appellees in connection with this point are not pertinent in any manner to any of the questions involved in the instant case.

Appellees then contend, fourth, that the subrogation of the stockholder by virtue of Section 322a of the Civil

Code would work no unjust payment out of the assets of the insolvent corporation as between the creditor and the stockholder. The Court is respectfully referred to the "Appellants' Opening Brief" for a full discussion of this matter, and in particular to pages 26 to 29 thereof. Counsel for the Appellees has completely disregarded the fact that, prior to the enactment of Section 322a of the Civil Code of the State of California, a creditor had a vested right to proceed against all of the assets of a corporation for the satisfaction of his claim, as well as directly against the stockholders of the corporation for their proportionate share of the payment of his claim. Obviously, if stockholders who have paid a proportionate share of a creditor's claim are to be subrogated to that creditor's claim against the corporation on an equal basis and footing with the creditor, and if the assets of the corporation are not sufficient for full payment of all claims, then the creditor will have been deprived of a portion of the recourse which he enjoyed prior to the enactment of Section 322a of the Civil Code.

Appellees cite as authority for their contention that Section 322a of the Civil Code of the State of California is constitutional the case of *Patek vs. California Cotton Mills,* 4 Cal. App. 2nd 12. The factual circumstances in the case cited are such, however, as to preclude it from offering any authority in the instant case as to the constitutionality of the Code Section. In the Patek case, as observed by the Court, no one in whose behalf the constitutional questions could be raised was a party, except

the corporation which would not appear to have a right to protect any but its own interest. The complaint in the Patek case alleged that the corporation debtor was solvent, and the Court observed that it must therefore be assumed that it had property sufficient to pay its debts. The holding of the Court in the Patek case is definitely predicated upon the fact that the respondent corporation therein was at all times a solvent going concern. No creditors or creditors' rights were involved in the cited case, and the only point involved was as to whether or not the complaint stated a cause of action as against the corporation. It follows, therefore, that the cited case offers no authority for a determination of the constitutionality of Section 322a of the Civil Code as to a creditor of an insolvent corporation.

III.

THE APPELLANTS WERE NOT GUILTY OF LACHES, AND THE QUESTION OF LACHES IS IMMATERIAL.

In the instant case, the Appellants contend that the question of laches is immaterial, by reason of the fact that the original adjudication in bankruptcy is void, and the original petition for involuntary bankruptcy did not confer jurisdiction upon the Court. As a consequence, the adjudication may be attacked at any time, it being the duty of the Court to inquire into the facts of jurisdiction and act accordingly. It is the duty of the Court, when it believes its jurisdiction may have been imposed

upon, to inquire into the facts and act in accordance therewith. Lack of jurisdiction is a question the Court should consider whenever and wherever raised.

AUTHORITIES

In Re: *Ettinger,* 76 Fed. 2nd 741.

In Re: *Columbia Real Estate Company,* 101 Fed. 965.

The entire question of laches is discussed fully in "Appellants' Opening Brief" at pages 34 to 39 thereof. The Court is respectfully referred thereto for the full discussion of the subject and the authorities cited. The authorities cited by the Appellees may be distinguished in each instance by reason of the factual circumstances involved. In all of the cases cited by the Appellees, the original petition in bankruptcy was sufficient on its face to give the Court jurisdiction. Further too, in all such cases where a petition to vacate an adjudication had been denied for delay, some element of damage, changed condition, acquiesence, acceptance of benefit, etc., existed. In the instant case, the factual circumstances are directly opposite.

CONCLUSION

The "Appellants' Opening Brief" on file herein, together with the within "Appellants' Reply Brief" fully cover all of the points involved, and meet all of the points, arguments, and authorities advanced by the Appellees.

Under the reasoning and authorities presented on behalf of the Appellants, it is again respectfully submitted that the orders of the District Court should be reversed, and that the point raised in the appeal should be definitely determined by this Court.

Respectfully submitted,

T. H. CANFIELD,
Attorney for Appellants.

No. 9270

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, HORACE P. HOEFER, PETER DAVIDSON, CATHERINE DAVIDSON, and GEORGE GIOVANOLA, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees,

APPELLANTS' PETITION FOR REHEARING

Presented by Appellants After Decision Affirming Orders of District Court

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SUBJECT INDEX

Page

"A"

Grounds For Re-Hearing 2

"B"

Does Section 322a of the Civil Code of the State of California impair the obligation of contracts in violation of Article 1, Section 10, Clause 1, of the United States Constitution? 3

General Rules of Law Applicable to the Constitutional Question. 4

The Contract and its Obligation. 10

Impairment of the Contract Obligations. 17

Specific Errors in the Statements of the Court in its Decision. 23

"C"

Does Section 322a of the Civil Code of the State of California violate the Provisions of Article 1, Paragraphs 13 and 16, of the Constitution of the State of California? 30

"D"

Can Section 322a of the Civil Code of the State of California be construed in such a manner as not to make it violative of the Constitutions? 30

Conclusion 32

Certificate 33

TABLE OF CASES AND AUTHORITIES CITED

Page

Abilene National Bank vs. Dolley, 228 U. S. 1 5
Adams Pipe Works vs. Okell Well Machinery Co., 136 Cal. App. 608. 12
Aronson and Co. vs. Pearson, 199 Cal. 286. .....12, 15, 17, 31
Barnitz vs. Beverly, 163 U. S. 122. 9
Bradley vs. Lightcap, 195 U. S. 1. 8
Bronson vs. Kinzie, 1 How. 311, 315. 5
Butz vs. Muscatine, 8 Wall. 583. 9
Chicago vs. Sheldon, 9 Wall. 50. .....6, 15
Chicago, B. and Q. R. Company vs. Cram, 228 U. S. 70. 5
Civil Code of the State of California, Section 309. 12
Civil Code of the State of California, Section 322a. 3, 11, 13, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31
Civil Code of the State of California, Section 346. 13
Civil Code of the State of California, Section 363. 13
Civil Code of the State of California, Section 364. 13
Cleveland vs. Pennsylvania, 15 Wall. 300, 320. 8
Columbia R. Gas and E. Company vs. South Carolina, 261 U. S. 236. 8
Coulter Dry Goods Company vs. Wentworth, 171 Cal. 500 12
Curran vs. Arkansas, 15 How. 304. 7
Damiano vs. Bunting, 40 Cal. App. 566 12
Dennis vs. Superior Court, 91 Cal. 548. 12
Detroit United R. Company vs. Michigan, 242 U. S. 238. 10
Douglass vs. Pike County, 101 U. S. 677, 687. .....6, 15
Edwards vs. Kearzey, 96 U. S. 595. .....5, 7, 9, 15
Ennis Water Works vs. Ennis, 233 U. S. 652. .....6, 15
Farrington vs. Tennessee, 95 U. S. 683. 8
Fletcher vs. Peck, 6 C. R. 87. 5
Foreign Mines Development Company vs. Boyes, 180 Fed. 594. 12
Georgia R. and Power Company vs. Decatur, 262 U. S. 432. 10
Great Southern Fireproof Hotel Company vs. Jones, 193 U. S. 532, 548. .....6, 15
Green vs. Biddle, 8 Wheat. 1. 8
Gunn vs. Berry, 15 Wall. 610. 9
Hendrikson vs. Apperson, 245 U. S. 105. 8
Holt vs. Thomas, 105 Cal. 273. 14
Home Building and Loan Ass'n vs. Blaisdell, 290 U. S. 398. 8

TABLE OF CASES AND AUTHORITIES CITED

Page

Houston and T. C. R. Company vs. Texas, 177 U. S. 77. 10
Hoyt vs. Hart, 13 Wall. 646. 9
In Re: California Mutual Life Insurance Company, 81 Cal. 364... 14
Kennedy vs. California Savings Bank, 97 Cal. 93. 12
Lininger vs. Potsford, 32 Cal. App. 386. 12
Louisiana vs. New Orleans, 102 U. S. 203, 206. 7
Louisiana vs. Pilsbury, 105 U. S. 278, 295. ..... 6, 15
Louisiana vs. St. Martin's Parish, 111 U. S. 716, 720. ..... 7, 9
Major vs. Walker, 23 Cal. App. 465. 12
McCracken vs. Hayward, 2 How. 608, 612. ..... 5, 7, 8
McGahey vs. Virginia, 135 U. S. 662, 693. 9
McGowan vs. McDonald, 111 Cal. 57 12
Meza vs. Sword, 136 Cal. App. 292. 12
Muhlker vs. New York and H. R. Company, 197 U. S. 544, 570..... 6, 15
Murray vs. Charleston, 96 U. S. 432, 444. 5
Oden vs. Saunders, 12 Wheat. 213. 5
Patek vs. California Cotton Mills, 4 Cal. App. 2nd 12, 40 Pac. 2nd 921. ..... 3, 4, 25
Planters Bank vs. Sharp, 6 How. 301. ..... 8, 9
Pritchard vs. Norton, 106 U. S. 124. 8
Rees vs. Watertown, 19 Wall. 107. 9
Royal Trust Company vs. McBean, 168 Cal. 642. 12
Sacramento Bank vs. Pacific Bank, 124 Cal. 147. ..... 13, 14, 16, 17, 19, 20, 22
Sauer vs. New York, 206 U. S. 536. 6
Seton Hall College vs. South Orange, 242 U. S. 100. 10
Sturges vs. Crowninshield, 4 Wheat. 122. ..... 5, 7
Trinidade vs. Atwater Canning Company, 128 Pac. 756. 14
U. S. Constitution, Article 1, Section 10, Clause 1. ..... 5, 26, 29
United States vs. Quincy, 4 Wall. 535, 550. ..... 5, 7, 8, 9
Walker vs. Whitehead, 16 Wall. 314. ..... 5, 7, 8, 9, 15
Waring vs. Pitcher, 135 Cal. App. 493. 12
West River Bridge Company vs. Dix, 6 How. 507, 532. 5
Worthen Company vs. Kavanaugh, 295 U. S. 56. ..... 7, 9

No. 9270

IN THE

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Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON, and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees,

APPELLANTS' PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT, AND THE HONORABLE JUDGES THEREOF:

J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, Appellants herein, respectfully request a re-hearing in the within cause, for the reasons and upon the grounds hereinafter set forth. Proper certificate of counsel in compliance with Rule 25 of the within Court is appended hereto.

"A"

GROUNDS FOR RE-HEARING

Appellants hereby respectfully set forth the following grounds and reason upon which a re-hearing should be granted in the within cause:

1. Material points of law and fact are overlooked by the Court in arriving at its decision.

2. The decision of the Court is based upon premises and principles of law which are erroneous.

3. The within cause involves constitutional questions upon which the Appellants believe the decision of the Court to be in error.

4. The importance of the question of law involved is such, and the effect of the decision on pending matters and litigation is such, as to merit a re-examination and re-hearing of the cause.

5. Statements of the Court in the decision are not clear, and the decision is being, and is subject to being, cited as authority for principles of law which are erroneous. The Court by its language makes implied

findings of law which Appellants feel were not intended, and which are in error.

6. Statements of law and judicial decisions relied upon by the Court in reaching its decision are not applicable in the instant case.

"B"

DOES SECTION 322a OF THE CIVIL CODE OF THE STATE OF CALIFORNIA IMPAIR THE OBLIGATION OF CONTRACTS IN VIOLATION OF ARTICLE 1, SECTION 10, CLAUSE 1, OF THE UNITED STATES CONSTITUTION?

The within Court in its decision has stated as follows:

> "We agree with *Patek vs. California Cotton Mills,* 4 Cal. App. 2nd 12, 40 Pac. 2nd 927, that Section 322a is not unconstitutional. So far as the creditor is concerned he has the same rights he had before the enactment of the statute, i.e., the right to proceed against the stockholders and the right to proceed against the corporation and share in the assets. The creditor has been deprived of none of his rights although his exercise thereof may bear less fruit, but he is in no different position, for instance, than if taxes were increased, for his recovery would then be less. A new right has been created where none existed before, but that right runs against the corporation not the creditor. The complaint in that respect should be made by the corporation not its creditors." "With respect to the prohibition against impairment of obligations of a contract, the creditor had two obligations—that of the corporation to pay and that of the stockholder to pay. Neither has been impaired."

Appellants respectfully submit that such statements by the Court in the opinion are in error in that:

1. As far as the creditor is concerned he has not the same rights he had before the enactment of the statute.

2. The creditor has been deprived of his rights and has been placed in a different position.

3. The new right which has been created runs not only against the corporation but against the creditor.

4. The contract of the creditor constituted more than the obligation of the corporation to pay and that of the stockholder to pay.

5. The obligation of such contract has been definitely and violently impaired.

6. The holding of the California Appellate Court in the Patek case cannot be applied in the instant case.

The argument and authorities which follow are respectfully submitted to the Court. Appellants feel that material points of law and fact have been overlooked by the Court in following the decision of the District Court of Appeal of the State of California in the case of *Patek vs. California Cotton Mills,* 4 Cal. App. 2nd 12.

GENERAL RULES OF LAW APPLICABLE TO THE CONSTITUTIONAL QUESTION.

No state may pass any law impairing the obligation of contracts.

AUTHORITY

United States Constitution, Article 1, Section 10, Clause 1.

This contract clause is a limitation on power of the states, whatever form it may assume, if a contract right is thereby impaired.

AUTHORITIES

Murray vs. Charleston, 96 U. S. 432, 444.

Sturges vs. Crowinshield, 4 Wheat. 122.

Laws in force at the time a contract is entered into form a part of a contract, and any subsequent change of law which amounts to an impairment of the contract violates the provision of the Constitution.

AUTHORITIES

Fletcher vs. Peck, 6 CR. 87.

Oden vs. Saunders, 12 Wheat. 213.

Bronson vs. Kinzie, 1 How. 311, 315.

McCracken vs. Hayward, 2 How. 608, 612.

West River Bridge Company vs. Dix, 6 How. 507, 532.

United States vs. Quincy, 4 Wall. 535, 550.

Walker vs. Whitehead, 16 Wall. 314.

Edwards vs. Kearzey, 96 U. S. 595.

Abilene National Bank vs. Dolley, 228 U. S. 1.

Chicago, B. and Q. R. Company vs. Cram, 228 U. S. 70.

When a State Court has once interpreted a contract, that interpretation becomes part of the contract, and any subsequent change to the injury of a contracting party impairs the obligation of a contract.

AUTHORITIES

Sauer vs. New York, 206 U. S. 536.

Muhlker vs. New York and H. R. Company, 197 U. S. 544, 570.

After a statute has become settled by judicial construction, the construction becomes a part of the contract itself, and a change of decision operates as an impairment of the obligation of contract.

AUTHORITIES

Douglass vs. Pike County, 101 U. S. 677, 687.

Louisiana vs. Pilsbury, 105 U. S. 278, 295.

Settled judicial construction by State Courts is deemed to have been incorporated into the contract.

AUTHORITIES

Chicago vs. Sheldon, 9 Wall. 50.

Ennis Water Works vs. Ennis, 233 U. S. 652.

Great Southern Fireproof Hotel Company vs. Jones, 193 U. S. 532, 548.

While it has been held that legislation enhancing the cost and difficulty of performance, or diminishing the value of such performance, may impair the contract, but

does not necessarily impair the obligation of the contract so long as the obligation of performance remains in full force, it is nevertheless also true that the obligation of a contract includes everything within its obligatory scope; among these elements nothing is more important than the means of enforcement; this is the breath of its vital existence. Without it, the contract as such, ceases to be; the ideas of right and remedy are inseparable.

The obligation of a contract is in fact the law which binds the parties to perform their agreement. It is the means which at the time of its creation the law affords for its enforcement.

AUTHORITIES

Edwards vs. Kearzey, 96 U. S. 595, 600.

Sturges vs. Crowinshield, 4 Wheat. 122, 197.

Curran vs. Arkansas, 15 How. 304.

McCracken vs. Hayward, 2 How. 608.

United States vs. Quincy, 4 Wall. 535.

Worthen Company vs. Kavanaugh, 295 U. S. 56.

Louisiana vs. St. Martin's Parish, 111 U. S. 716, 720.

Louisiana vs. New Orleans, 102 U. S. 203, 206.

Walker vs. Whitehead, 16 Wall. 314.

Any law which, in its operation, amounts to a denial or obstruction of the rights accruing under a contract impairs its obligation, as does a law which diminishes

the duty to fulfill or impairs the right to enforce the contract. In other words, any law which invalidates, extinguishes, releases, or derogates from substantial contractural rights impairs its obligation.

AUTHORITIES

Cleveland vs. Pennsylvania, 15 Wall. 300, 320.

Colombia R. Gas and E. Company vs. South Carolina, 261 U. S. 236.

Bradley vs. Lightcap, 195 U. S. 1.

McCracken vs. Hayward, 2 How. 608.

Pritchard vs. Norton, 106 U. S. 124.

Home Building and Loan Ass'n vs. Blaisdell, 290 U. S. 398.

Hendrikson vs. Apperson, 245 U. S. 105.

The constitutional prohibition against impairment of contract obligations has no reference to degree of impairment. The extent of impairment is immaterial. It is not a question of degree. The obligation must not be diminished at all.

AUTHORITIES

United States vs. Quincy, 4 Wall. 535.

Green vs. Biddle, 8 Wheat. 1.

Walker vs. Whitehead, 16 Wall. 314.

Farrington vs. Tennessee, 95 U. S. 683.

Planters Bank vs. Sharp, 6 How. 301.

The means for the enforcement of a contract which exists at the time of its creation form a part of its obligation which a State cannot substantially destroy without violating the contract clause of the Constitution. The law which exists at the time of the making of a contract enters into and forms a part of it. This embraces those laws which affect its validity, construction, discharge, and enforcement. The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to creditors.

AUTHORITIES

Gunn vs. Berry, 15 Wall. 610.

United States vs. Quincy, 4 Wall. 535.

Louisiana vs. St. Martin's Parish, 111 U. S. 716.

Hoyt vs. Hart, 13 Wall. 646.

Barnitz vs. Beverly, 163 U. S. 122.

McGahey vs. Virginia, 135 U. S. 662, 693.

Edwards vs. Kearzey, 96 U. S. 607.

Walker vs. Whitehead, 16 Wall. 314.

Butz vs. Muscatine, 8 Wall. 583.

Planter's Bank vs. Sharp, 6 How. 330.

W. B. Worthen Company vs. Kavanaugh, 295 U. S. 56.

Rees vs. Watertown, 19 Wall. 107.

It is the duty of a Federal Court to determine the extent, construction, and validity of the contract, and to

determine whether as so construed it has been impaired by any subsequent legislation to which effect has been given. When called upon to decide whether state legislation impairs the obligation of a contract, independent judgment should be exercised by a Federal Court upon these questions:

1. Was there a contract?

2. If so, what obligation arose from it?

3. Has that obligation been impaired by subsequent legislation?

AUTHORITIES

Houston and T. C. R. Company vs. Texas, 177 U. S. 77.

Seton Hall College vs. South Orange, 242 U. S. 100.

Detroit United R. Company vs. Michigan, 242 U. S. 238.

Georgia R. and Power Company vs. Decatur, 262 U. S. 432.

THE CONTRACT AND ITS OBLIGATION.

What, in the instant case, constituted the contract and its obligation?

This portion of this petition, being directed to the question of impairment and contract rights, is devoted of course to the contract claims of J. H. McCune and Alice W. Jackson. The original contract asserted by J. H.

McCune is a note obligation of the bankrupt to the County National Bank and Trust Company of Santa Barbara, which note obligation has been assigned to J. H. McCune. This note obligation was incurred by the Company prior to the repeal of stockholders' liability in California, and prior to the enactment of Section 322a of the Civil Code. The contract claim of Alice W. Jackson is in the same category as the contract claim of J. H. McCune.

In order to measure the original contract and its obligations to determine whether there has been any impairment, it is first necessary to determine, in accordance with the principles of law hereinabove set forth, what elements outside of the original writing in the contract became a vested part thereof, to be considered as a part thereof in determining whether or not contract rights have been impaired.

At the time of the making of the original contract, the creditor had a cause of action against the bankrupt, and a cause of action against the stockholders of the bankrupt. Both causes of action arose at the same time and were separate, distinct, and severable. The liability of the stockholder arose entirely by statute, but was, and has been held to be contractural in nature. The element of contract between creditor and the stockholder arose by reason of the fact that the stockholder by consenting to become such assumed the obligation imposed by the statute, and in effect contracted with any future creditors of the Company to be liable under the statute.

AUTHORITIES

Royal Trust Company vs. McBean, 168 Cal. 642.

Dennis vs. Superior Court, 91 Cal. 548.

Damiano vs. Bunting, 40 Cal. App. 566.

Lininger vs. Potsford, 32 Cal. App. 386.

Major vs. Walker, 23 Cal. App. 465

Foreign Mines Development Company vs. Boyes, 180 Fed. 594.

Coulter Dry Goods Company vs. Wentworth, 171 Cal. 500.

McGowan vs. McDonald, 111 Cal. 57.

Kennedy vs. California Savings Bank, 97 Cal. 93.

Waring vs. Pitcher, 135 Cal. App. 493.

Adams Pipe Works vs. Okell Well Machinery Co., 136 Cal. App. 608.

Meza vs. Sword, 136 Cal. App. 292.

Aronson and Co. vs. Pearson, 199 Cal. 286.

At the time of the original contract, the stockholder had no right or cause of action against the bankrupt in the event the stockholder paid a portion of the Corporation indebtedness under the statutory stockholders' liability. This appears to be so by reason of the fact that the liability of the stockholder was a separate and several liability, and the stockholder had no right to recover from the corporation by subrogation or otherwise. In addition thereto, it has been held that a stockholder could not, under the provisions of Section 309 of the Civil Code of the State of California in effect at such time, now incor-

porated into Sections 346, 363, and 364 of the same Code, share in the assets or the dividends of an insolvent corporation, by subrogation or otherwise. This proposition seems to have been settled both by statute and by judicial decision at the time the contracts now before this Court were entered into. (*Sacramento Bank vs. Pacific Bank,* 124 Cal. 147).

Section 322a of the Civil Code did create a new right, therefore, where none existed before. Before its enactment, the stockholder of a corporation by becoming such stockholder contracted as to creditors not to share in the assets of the corporation, especially an insolvent corporation, by subrogation or otherwise, and not to have or exercise a right or cause of action against the corporation after payment of a portion of a creditor's claim by reason of such stockholder's liability.

The proposition that a stockholder, prior to enactment of Section 322a, Civil Code, contracted not to share in the assets of a corporation by subrogation or otherwise appears settled by reason of the fact that at the time the corporate contract was entered into such stockholder had no such right or cause of action against the corporation. This being in effect the state of law which existed at the time the corporate contract was entered into, such state of law entered into the terms of the contract insofar as its interpretation is concerned relative to the impairment of contracts. This proposition was settled by statute, and by judicial decision. So too, the stockholder of a cor-

poration by becoming such contracted as to creditors not to proceed or have a right or cause of action against the corporation after payment of a portion of the creditor's claim. This is so because the state of law which existed at the time the contract came into existence was such as to preclude such right or cause of action in favor of the stockholder. There was, therefore, a waiver by contract of any right of subrogation insofar as a creditor is concerned, especially in the case of an insolvent corporation.

AUTHORITIES

Sacramento Bank vs. Pacific Bank, 124 Cal. 147.

Trinidade vs. Atwater Canning Company, 128 Pac. 756.

Holt vs. Thomas, 105 Cal. 273.

In Re: *California Mutual Life Insurance Company,* 81 Cal. 364.

See also all authorities hereinabove cited.

It necessarily appears, therefore, that the measure of the contract with respect to the impairment clause of the Constitution of the United States is the writing of the contract itself together with the above mentioned matters of statute and decision incorporated therein by the law and settled judicial decision in force at the time of the original contract.

AUTHORITIES

Edwards vs. Kearzey, 96 U. S. 595.

Walker vs. Whitehead, 16 Wall. 314.

Muhlker vs. New York and H. P. R. Company, 197 U. S. 544.

Douglas vs. Pike County, 101 U. S. 677, 687.

Louisiana vs. Pilsbury, 105 U. S. 278, 295.

Chicago vs. Sheldon, 9 Wall. 50.

Ennis Water Works vs. Ennis, 233 U. S. 652.

Great Southern Fireproof Hotel Company vs. Jones, 193, U. S. 532, 548.

In the instant case, therefore, the contract creditor acquired by contract, as such contract is to be measured in interpreting the same and in defining the obligations thereof with respect to the impairment thereof under the United States Constitution, the following:

1. The obligation of the corporation under the written contract to pay the amount of the obligation.

2. The obligation of the stockholder for payment of a proportionate share of the corporate obligation to the debtor. This obligation was settled by statute, and unquestionably formed an integral part of the contract.

AUTHORITIES

Aronson and Co. vs. Pearson, 199 Cal. 286.

Other cases hereinabove cited.

3. The obligation of the creditor not to have recourse against the corporation or its assets, by subrogation or

otherwise. This appears to be a necessary conclusion, because the settled statutory law and judicial decision in the State of California at the time the contracts were made and entered into established that the stockholder had no recourse against the corporation after payment of its stockholder's liability, and therefore the stockholder had no recourse against its assets on such claim. In the case of an insolvent corporation, the statutory law specifically precluded the stockholder from sharing in any assets of the corporation ahead of the creditor.

AUTHORITIES

Sacramento Bank vs. Pacific Bank, 124 Cal. 147.

Other cases hereinabove cited.

4. The right to proceed against the corporation and its assets, and in particular to proceed against its assets free and clear of any claim of a stockholder, arising by subrogation or otherwise, particularly if the corporation be insolvent.

AUTHORITIES

Sacramento Bank vs. Pacific Bank, 124 Cal. 147.

Other cases hereinabove cited.

5. The right to proceed against the stockholder and his assets for the proportionate stockholder's liability as established by statute.

AUTHORITIES

Aronson and Co. vs. Pearson, 199 Cal. 286.

Other cases hereinabove cited.

6. The right, in case of an insolvent corporation to share in its assets free of the claim of a stockholder by subrogation or otherwise.

AUTHORITIES

Sacramento Bank vs. Pacific Bank, 124 Cal. 147.

Other cases hereinabove cited.

IMPAIRMENT OF THE CONTRACT OBLIGATIONS.

Appellants respectfully submit that each and every right and obligation accruing under the corporate contracts, as just hereinabove listed, has been definitely impaired by the enactment and application of Section 322a of the Civil Code. Taking up for discussion the manner in which such impairment has been effective in relation to each such right and obligation, appellants submit the following argument. Each subdivision of the argument corresponds with the same numbered subdivision designating the rights and liabilities accruing under the contracts as just hereinabove set forth.

1. The obligation of the corporation to pay the amount to be paid to the creditor under the contract has been impaired. True, the original cause of action against the corporation yet exists, but the obligation of the cor-

poration to pay the contract amount extends not only to its literal written promise to pay, but includes the obligation to make its assets available for such payment in the event of insolvency, and includes the right of a creditor to have recourse to such assets for payment of a creditor's claim. Such right and obligation of the contract, under the settled statutory law and settled judicial decision in effect at the time of the making of the contract, includes the right of the creditor to proceed against the corporate assets, and in particular the assets of an insolvent corporation, free of any claim of a stockholder of such corporation, whether such stockholder's claim arose by subrogation or otherwise. Has this right been impaired? Definitely it has, because under the present decision of the within Court, the stockholders, under their subrogated claims, have equal rights to corporate assets with the creditor, and the creditor's right of recovery has been lessened and impaired to that extent. As a concrete example, let us assume the existence of a corporation with corporate liabilities of $100,000.00. Total creditor claims are $200,000.00, represented by a first creditor claim of $100,000.00 and a second creditor claim of $100,000.00. Assume further, the existence of a stockholder holding 50% of the corporate stock. Under these conditions, and prior to the enactment of Section 322a, creditor number one proceeds against the stockholder and recovers one-half of his creditor's claim, or the sum of $50,000.00. Creditor number one thereupon presents his total claim in the insolvency proceedings, and receives a dividend

of 50% thereon, or a further sum of $50,000.00, making in all a total recovery of $100,000.00. That the creditor could present his entire claim in the insolvency proceedings after collecting a portion thereof from the stockholder appears to be established as a principal of law in the case of *Sacramento Bank vs. Pacific Bank,* 124 Cal. 147. Under these conditions, therefore, the creditor would have recovered the entire amount of his claim. Even assuming, however, for the purpose of this example, that after collecting the $50,000.00 from the stockholder, the creditor could only prove the balance of his claim, $50,000.00, in the insolvency proceedings, he would receive in the insolvency proceedings a dividend of $33,-333.33, making a total recovery of $83,333.33. In this event, creditor number two would recover from the insolvent estate a dividend of $66,666.66, and yet have recourse against the stockholder.

Measure against this example, the rights of a creditor after the enactment of Section 322a, if it be construed in the manner designated in the prior opinion of this Court. In that event, creditor number one would proceed against the stockholder and recover 50% of his claim, or a total sum of $50,000.00. The stockholder would thereupon become subrogated to the amount of such payment, and would thereupon have a claim of $50,000.00 against the corporation. Creditor number two and creditor number one and the subrogated stockholder then being able to prove claims against the insolvent estate, the recovery of the creditor number one from the insolvent estate would

be limited to a sum of $25,000.00, making a total recovery of $75,000.00 as against a minimum recovery of $83,-333.33 prior to Section 322a as hereinabove set forth, and as against a total and full recovery of $100,000.00 under the authority of the rule set forth in *Sacramento Bank vs. Pacific Bank,* 124 Cal. 147.

It is mathematically certain, therefore, that Section 322a takes away from the creditor a substantial right of recovery, and the obligation of the contract has thereby been impaired. It is true that this Court in its opinion has said "The creditor has been deprived of none of his rights although his exercise thereof may bear less fruit, but he is in no different position, for instance, than if taxes were increased, for his recovery would then be less." The appellants must respectfully contend that such a statement is not a correct statement of the law. Depriving a creditor of an asset of the insolvent corporation is clearly an impairment of a right and obligation accrued under the contract. To say that the creditor is in no different position than if taxes were increased is also in error, and brings into the argument the question of a further rule of law which is fundamental. It is fundamental that the power of a State to tax, and to exercise its police power, is a sovereign power, the exercise of which is essential to the existence of the State. The exercise of such right, therefore, does not or cannot come within the prohibition of the impairment of contract clause of the United States Constitution. If a contract right is impaired by an increase of tax, or a recovery under a contract is made less

by such increase in tax, or by the exercise by the State of its sovereign police power, there is possibly no violation of the constitutional prohibition against the impairment of the obligation of contract. But such sovereign right, such power of taxation, such police power, are not here involved. Section 322a is not an exercise of a sovereign right or power, and does do violence to the rights and obligations which accrued under the contract here presented.

2. The obligation of the stockholder for payment of a proportionate share of the debt has also been impaired. Under the statutory law and the judicial decisions in effect at the time the contracts were made, the obligation of the stockholders for such payment existed without recourse on the part of the stockholder to the assets of the corporation, and in particular to the assets of an insolvent corporation. If Section 322a is to be held constitutional and given the interpretation as set forth in the decision of this Court, this obligation has definitely been impaired, in that the stockholder has been given a right which did not exist before, to pay a portion of his stockholder's liability from the assets of the insolvent corporation. Measured again by the concrete example hereinabove set forth, the stockholder, if he was required to pay the $50,000.00 as payment of one-half of the creditor's claim, could thereupon recover from the insolvent corporation's estate the sum of $25,000.00 by reason of subrogation under Section 322a, all to the impairment of the vested rights of the creditor.

3. The obligation of the creditor not to have recourse against the corporation or its assets, by subrogation or otherwise, has also been impaired. Prior to the enactment of Section 322a, under settled statutory law and judicial decisions, the creditor could not have recourse against the corporation or its assets, by subrogation or otherwise. (*Sacramento Bank vs. Pacific Bank,* 124 Cal. 147). This obligation became an integral part of the contract. Section 322a violates and impairs this obligation in that it directly gives the creditor recourse against the corporation and against its assets, even though insolvent, to the damage and detriment of the creditor.

4. The right to proceed against the corporation and its assets has been impaired, in that the right of the creditor to proceed against all the assets of a corporation, and in particular an insolvent corporation, has been taken away by the subrogation under Section 322a of the stockholder to a portion of the creditor claim. In effect, again under the concrete example hereinabove set forth, one-fourth of the assets of the insolvent corporation have been removed from the reach of the creditors of the corporation. This has been accomplished by special statute, and not in the exercise of the power of taxation or of the police power of the State.

5. The right to proceed against the stockholder and his assets has also been impaired. Prior to the enactment of Section 322a of the Civil Code, the creditor had separate, several, and distinct causes of action against the

corporation and the stockholder. After the enactment of Section 322a, the creditor has no longer the unrestricted right to proceed against the stockholder and the assets of the stockholder, but is placed in the position of proceeding against the stockholder at the risk of lessening his recovery against the corporation and at the risk of subjecting to the claim of a stockholder a portion of the corporate assets.

6. The contract right of the creditor, in case of an insolvent corporation, to share in its assets free of the claim of a stockholder by subrogation or otherwise has been impaired. The argument and examples hereinabove set forth clearly establish this point.

SPECIFIC ERRORS IN THE STATEMENTS OF THE COURT IN ITS DECISION.

This Court in its decision has said: "So far as the creditor is concerned he has the same rights he had before the enactment of the statute, i. e., the right to proceed against the stockholders and the right to proceed against the corporation and share in the assets." In accordance with the argument, authorities, and examples hereinabove set forth, appellants respectfully submit that the creditor has not the same rights he had before the enactment of the statute. The obligation of the corporation to pay the creditor has been impaired. The obligation of a corporation to make its assets available for payment of creditor claims, especially in the event of in-

solvency, has been impaired. The right of the creditor to resort to such assets to the exclusion of stockholders has been taken away. The right to proceed against the stockholder and the assets of the stockholder has been impaired. In these respects the creditor has been deprived of his vested rights. The fact that the exercise of his remaining rights after the enactment of Section 322a must bear less fruit is conclusive upon the proposition that material contract rights have been taken away from the creditor, and taken away by special legislation and not by legislation enacted in the exercise of the power of taxation or of the police power of a State.

This Court in its decision has said: "A new right has been created where none existed before, but that right runs against the corporation not the creditor." Appellants are obliged to contend that this statement is in error. It is true that new rights have been created, but such new rights run directly against the creditor and do not materially effect the corporation in any manner, especially if the corporation be insolvent. A new right has been given to a stockholder to be subrogated to a portion of the creditor's claim against the corporation and to be allowed a direct cause of action against the corporation for such subrogated portion. This new right runs directly against the creditor, in that it takes directly from the creditor material and substantial rights of property which had accrued to the creditor under the original contract. The new right runs against the creditor because it gives the stockholder a right to assets which were theretofore

available solely to the creditor in payment of his claim, and to the exclusion of the stockholder. A new right has been created in favor of the stockholder and against the creditor in that the stockholder has been given a right to share with the creditor in the assets of an insolvent corporation. A new right has been given to the stockholder as against the creditor in that the stockholder has been given the right to recover from corporate assets theretofore specifically subject only to the creditor's claim a portion of any amount paid by the stockholder to the creditor under stockholder's liability.

This Court in its opinion has said: "With respect to the prohibition against impairment of obligations of a contract, the creditor had two obligations—that of the corporation to pay and that of the stockholder to pay. Neither has been impaired." The argument, authorities, and examples hereinabove set forth establish that the obligations of the contract have been impaired, when the obligations of the contract are measured not alone by the written words of the contract, but by the measure which should be applied when determining whether or not the obligation of such a contract has been impaired by state legislation.

This Court in its opinion has said: "We agree with *Patek vs. California Cotton Mills,* 4 Cal. App. 2nd 12, 40 Pac. 2nd. 927, that Section 322a is not unconstitutional." But the holdings of the District Court of Appeals of the First District, State of California, in the Patek

case, are not applicable or controlling here in any manner. In the Patek case, the Court had to do with a corporation which was admittedly solvent. The entire opinion and the conclusions of the Court in the Patek case are primarily based upon the theory that there was no question of insolvency. The rights of creditors were not involved. The action was merely an action brought by a stockholder who had paid a portion of a creditor's claim against a solvent corporation. The various rights of a creditor, and the obligations which arise from the contract of a creditor, were not before the Court in the Patek case, and were therefore not adjudicated or determined therein. It is apparent from a reading of the Patek case, and a digest of the entire opinion, that the Court in the Patek case had in mind that creditor's rights in connection with Section 322a would present a different problem than the problems which were there presented to the Court. The Court stated:

> "Every subscriber for stock agreed that liability imposed by Section 3, Article 12, of the Constitution, and Section 322 of the Civil Code, was a term and was of the obligation of his contract with the corporation. If as between him and it those provisions obligated the stockholder to pay the corporation's debt, the corporation had a vested right to have him pay such debt, and the repeal of those provisions violated the obligations of the subscription contract as to all debts incurred by the corporation after the stockholder received his certificate of stock. *The repeal had no such effect because the provisions referred to were enacted for the benefit of the creditor and not for the benefit of the corporation.*" (Italics ours).

Is this not a direct finding that the obligation of a stockholder to pay a creditor, as it existed prior to the enactment of Section 322a of the Civil Code, was a direct part of the contract and obligation which arose when the creditor's claim came into existence? The Court further states:

> "The means for the protection of their rights is available, namely, by intervention or other appropriate procedural methods whereby issue could be joined as to the solvency of the corporation."

Is this not then a direct holding that in the instance of an insolvent corporation creditor's rights are to be protected against the literal provisions of Section 322a of the Civil Code? Appellants respectfully submit again to the Court that the Patek case is not authority for the holding and finding of this Court in its opinion.

This Court in its opinion has also stated as follows:

> "Under this statute, the stockholder succeeds to the rights of the creditor against the corporation to the extent of the amount paid by the stockholder. The stockholder to the extent of such amount is substituted for the creditor. The corporate obligation becomes divided, and is several, the creditor no longer having an interest in the part of the obligation to which the stockholder succeeds. The situation is the same as if the corporation had made separate notes to the creditor and to the stockholder."

The appellants respectfully submit that the statements of the Court in this paragraph are far too broad and do not correctly state the law. The Court states that the creditor no longer has any interest in the part of the obligation to

which the stockholder succeeds. That this is not the true state of fact appears from the proposition that the creditor is interested and has an interest in the part of the obligation to which the stockholder succeeds, in that the creditor is interested in his right not to have that part of the obligation paid or satisfied from the assets of an insolvent debtor until the entire claim of the creditor has been paid. This is a vested interest and right which accrued to the creditor at the time the obligation was incurred. The Court states that the corporate obligation becomes divided and is several, and that the situation is the same as if the corporation had made separate notes to the creditors and to the stockholders. The wording of the Court is unfortunate in that it gives rise to implications which we do not believe were intended. The Court in effect holds, by stating that the situation is the same as if the corporation had made separte notes, that the original obligation has been divided, separated, and now constitutes two separate and distinct obligations. This in effect holds that the stockholder has a new, separate, and distinct right and cause of action against the corporation, which is obviously not intended by the statute itself. Section 322a provides that the stockholder be subrogated to the extent of his payment to the claim of the creditor against the corporation. Definitely the wording of the statute creates a subrogation. Definitely also, the wording of the statute does not create a new, separate and distinct cause of action. If the legislature so intended, the statute would have provided that upon payment of the stockhold-

er's liability by a stockholder, the stockholder should thereupon have a new, separate, and distinct cause of action against the corporation for the amount so paid. Not having so provided, appellants contend that such construction cannot be read into the statute in face of the direct wording thereof which provides for a subrogation only. The wording of this Court in the paragraph just hereinabove mentioned has been used and presented as authority for the proposition that the subrogated stockholder's claim is a new, separate, and direct obligation against the corporation, and not a subrogation as intended and provided by the statute. The opinion in the instant case has been cited as authority for this contention in two cases now pending in the Superior Court of the State of California, in and for the County of Santa Barbara. Appellants respectfully contend that the opinion of this Court is in error in this respect, and that the opinion should be corrected so that results will not accrue therefrom which were not intended by the Court.

In concluding this portion of the argument, appellants respectfully contend that Section 322a of the Civil Code of the State of California, if given the construction set forth in the opinion of this Court, violates the provisions of Article I, Section 10, Clause 1, of the Constitution of the United States, and of Amendment 14 of the Constitution of the United States.

"C"

DOES SECTION 322a OF THE CIVIL CODE OF THE STATE OF CALIFORNIA VIOLATE THE PROVISIONS OF ARTICLE I, PARAGRAPHS 13 AND 16, OF THE CONSTITUTION OF THE STATE OF CALIFORNIA?

The argument, reasoning, authorities, and examples hereinabove set forth, are equally applicable to the question of whether or not Section 322a is unconstitutional under the provisions of the Constitution of the State of California hereinabove cited. Appellants respectfully submit that Section 322a of the Civil Code impairs the obligation of contract and deprives the creditor of property without due process of law in violation of the specific named sections of the Constitution of the State of California.

"D"

CAN SECTION 322a OF THE CIVIL CODE OF THE STATE OF CALIFORNIA BE CONSTRUED IN SUCH A MANNER AS NOT TO MAKE IT VIOLATIVE OF THE CONSTITUTIONS?

Section 322a of the Civil Code of the State of California can be held to be constitutional only if it is to be construed in such a manner as not to impair vested rights of contract.

Appellants respectfully contend that the only manner in which Section 322a of the Civil Code of the State of California can be held to be constitutional is to construe this Section in such a manner as that the said Section, or the enforcement thereof, will not interfere with rights

which have vested, and will not constitute an impairment of the obligation of a contract. In order to do this, the subrogated stockholder may be accorded only the rights and remedies usually accorded to any other person who is partially subrogated to a creditor's claim.

Appellants do not claim that the stockholders were sureties for the corporation. Appellants do claim, however, that the obligation of a stockholder as it existed at the time the contracts were entered into was in the nature of a continuing guarantee of the payment of the corporate debts. (*Aronson and Co. vs. Pearson,* 199 Cal. 286.) Appellants further respectfully contend that if Section 322a is to be construed in such a manner as to render it constitutional, then the subrogated stockholder must occupy a position which is directly analogous to the position of a surety or an endorser who has paid a portion of a creditor's claim and is entitled to partial subrogation. In this event, the subrogated stockholder would not and could not have a claim which would be on an equal basis or parity with the claim of the original creditor in the bankruptcy proceedings. It would follow as of necessity that the full amount of the creditor's claim must first be satisfied before the stockholder be entitled to share in the assets of an insolvent corporation. It follows further, if these premises be correct, that the subrogated stockholder would not, unless the stockholder had paid the entire claim of a creditor, have a provable claim in bankruptcy. A considerable portion of "Appellants' Opening Brief" is devoted to the discussion of the analagous status of a

surety or endorser who has paid a portion of a creditor claim, and the Court is referred thereto for such complete discussion. Let be remembered that although the subrogated stockholder may not in strict construction be termed a surety of the corporation, nevertheless he is a continuing guarantor of the corporation indebtedness, and if he becomes subrogated to a portion of a creditor's claim, stands thereupon in a position which is exactly analogous to the position of a surety or an endorser who has paid a portion of a creditor's claim. In such event, no provable claim in bankruptcy vests in such subrogated stockholder.

CONCLUSION

By reason of all the facts, argument, authorities, and examples hereinabove set forth, appellants respectfully request that a rehearing be granted in the within matter. Too great importance cannot be placed upon the fact that the opinion of this Court is in its present condition subject to erroneous interpretation and construction. The law with respect to the points involved in this appeal will, when settled by a final decision herein, probably become the law of the case in the bankruptcy proceedings, and many and other various rights and equities of creditors and stockholders will be directly effected thereby.

Respectfully submitted,

T. H. CANFIELD,

Attorney for Appellants.

CERTIFICATE

STATE OF CALIFORNIA, }
COUNTY OF SANTA BARBARA } ss.

T. H. CANFIELD, being duly sworn, deposes and says:

That he is attorney for the appellants in the within cause; that he has devoted study and research to the questions of law presented in the within appeal, and further study and research to the decision of the within Court affirming the orders of the District Court of the United States, Southern District of Californa, Central Division;

That he hereby certifies that in his judgment the within "Appellants' Petition for Re-Hearing" is well founded; and that the same is not interposed for the purpose of delay.

Dated this 27th day of February, 1940.

T. H. Canfield

Subscribed and sworn to before me,
this 27th day of February, 1940.

L. V. Wood

Notary Public in and for said
County and State.

(Seal)

No. 9274

United States

Circuit Court of Appeals

For the Ninth Circuit.

STAR POINTER EXPLORATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, a Corporation, and RAYMOND MacDONALD, As Trustee of an Express Trust for Others,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9274

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Affidavit of Mailing Praecipe for Transcript..... 73

Answer of defendant Great Northern Ry. Co..... 7

Answer of Raymond J. MacDonald, as Trustee to Plaintiff's Complaint..... 50

Answer of United States of America..... 67

Appeal:

- Bond on 62
- Designation of Contents of Record on..... 79
- Notice of 60
- Statement of Points on..... 77

Attorneys, names and addresses..... 1

Bill of Exceptions..... 65

- Answer of the United States..... 67
- Objection of Plaintiff to the Application of Star Pointer Exploration Company to Intervene 67
- Order settling 70

Bond on Appeal..... 62

Caption 2

Clerk's Certificate to Transcript..... 75

Index

Page

Complaint 2

Complaint in Intervention of Raymond J. MacDonald, as Trustee 39

Exhibit to Complaint in Intervention:
A—Patent to SW¼ of Section 17, Township 33 North, Range 5 West, M. M. 48

Designation of contents of Record on Appeal 79

Intervention Pro Interesse Suo of Star Pointer Exploration Co. 22

Motion and Petition for Leave to Intervene by Raymond J. MacDonald, as Trustee 31

Motion and Petition for Leave to Intervene by Star Pointer Exploration Co. 13

Notice of Appeal by Star Pointer Exploration Co. 60

Notice of Motion for Leave to Intervene by Raymond J. MacDonald, as Trustee 30

Notice of Motion for Leave to Intervene by Star Pointer Exploration Co. 12

Objection of Plaintiff to the Application of Star Pointer Exploration Company to Intervene 67

Order Denying Motion and Petition of Star Pointer Exploration Co., for leave to Intervene 26

Index Page

Order extending time to docket Appeal in C. C. A. 71

Order settling Bill of Exceptions 70

Praecipe for Transcript on Appeal 72

Statement of points on Appeal 77

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 32 Civil

UNITED STATES OF AMERICA,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Be it remembered, that on March 23, 1939, the Plaintiff filed its complaint herein, which is in the words and figures following, to-wit: [2]

District Court of the United States for the District of Montana, Great Falls Division.

No. 32

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT

Now comes the above-named plaintiff, the United States of America, and files this its complaint by its undersigned solicitor, the duly appointed, qualified and acting United States Attorney in and for

the District of Montana. This suit is brought, filed and prosecuted by the special direction of the Attorney General of the United States and at the request of the Secretary of the Interior of the United States and in its own behalf, and for cause of action alleges:

I

That the defendant is a railway corporation, organized under the laws of the State of Minnesota for the purpose of operating and maintaining a railway and businesses incident thereto, and that the said Great Northern Railway Company has been at all times herein involved operating and maintaining a railway, engaged in part in the transportation of goods in interstate commerce.

II

That jurisdiction is vested in this Court under Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code. [3]

III

That under the Act of March 3, 1875 (18 Stat. 482), the St. Paul, Minneapolis and Manitoba Railway Company, a railroad corporation, was granted a right of way through the public lands of the United States. That on the eleventh day of October, 1907, the St. Paul, Minneapolis and Manitoba Railway Company conveyed to the Great Northern Railway all its rights of property, in-

cluding "various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of a railroad, hereinbefore described," etc. That the said Great Northern Railway Company is now operating and maintaining a railroad on the right of way over public lands granted to the St. Paul, Minneapolis and Manitoba Railway Company under the Act of March 3, 1875.

IV

That a portion of said right of way, so granted and now in use by the Great Northern Railway Company in operating and maintaining a railroad, crosses Sections 7, 16, 17 and 18 in Township 33 North, Range 5 West, and Sections 1, 2 and 12 in Township 33 North, Range 6 West, all in Glacier County, State of Montana.

V

That under the Act of March 3, 1875, the St. Paul, Minneapolis and Manitoba Railway Company or its successor, the Great Northern Railway Company, acquired neither the right to use any portion of said right of way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the oil or mineral deposits underlying the said right of way, but that such oil and minerals remained the property of the United States, and subject to its control and disposition. [4]

VI

That the defendant, the Great Northern Railway Company, claims and asserts ownership to the oils and minerals underlying its right of way as aforesaid and the right to take and remove the same and is about to and has threatened to use portions of the right of way, crossing the lands hereinbefore described, for the purpose of drilling for and removing subsurface oil.

VII

That unless the said Great Northern Railway Company, the defendant, be restrained and enjoined from drilling for and removing oil underlying the surface of the right of way hereinbefore described the United States will be deprived of its property and the right thereto and will suffer irreparable injury.

VIII

That any operation or proceeding for, or the taking of any oil, gas, or minerals from the subsurface of the right of way hereinbefore described constitutes a violation of the terms and provisions of the said Act of March 3, 1875.

IX

That no lease has been issued to the defendant, the Great Northern Railway Company under the Act of May 21, 1930 (46 Stat. 373), to drill upon or remove deposits of oil and gas under the said right of way of the defendant, nor has any application therefor been made.

Wherefore, the plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any manner using the right of way granted, as hereinbefore described, for the purpose of drilling for and removing oil, gas and minerals underlying its right of way except under a lease issued pursuant to the provisions of the said Act of May 21, 1930, and that a permanent injunction issued, restraining the defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way, crossing the lands hereinbefore [5] described, or any other lands granted under the Act of March 3, 1875, and now owned or used by the said defendant except under a lease issued pursuant to the provisions of the said Act of May 21, 1930.

JOHN B. TANSIL,
United States Attorney.

United States of America,
District of Montana—ss.

John B. Tansil, being first duly sworn, on oath deposes and says:

That he is the duly appointed, qualified and acting Attorney of the United States, in and for the District of Montana, and as such, makes this verification to the foregoing Complaint; that he has read the said Complaint and knows the contents

thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN B. TANSIL.

Subscribed and sworn to before me this 21st day of March, 1939.

[Seal] ROY F. ALLAN,

Notary Public in and for the District of Montana, residing at Billings, Montana.

My Commission expires June 29, 1941.

[Endorsed]: Filed March 23, 1939. [6]

Thereafter, on April 18, 1939, Answer of Great Northern Railway Company, Defendant, was duly filed herein in the words and figures following, to-wit: [7]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant above named and answers the complaint of the plaintiff herein as follows:

I

Defendant admits the allegations in paragraphs I, II, III, IV, VI, and IX of said complaint.

II

Defendant denies paragraph V of said complaint and each and every allegation therein contained.

III

Answering paragraph VII of said complaint, defendant admits that unless it is restrained therefrom, it will proceed to drill for and remove the oil underlying the surface of the right of way described in said complaint, but denies that said oil, or any part thereof, is the property of the United States, and denies that the United States will be deprived of any property or that it will suffer any irreparable or other injury as a result of defendant's intended action.

IV

Defendant denies paragraph VIII of said complaint, and each and every allegation therein contained.

V.

Further answering said complaint, and as an affirmative defense thereto, defendant alleges that there is oil underlying said right of way of a character and quantity suitable for use as fuel upon defendant's locomotives operated upon its interstate railroad which passes over said right of way, and that it is economically practicable and [8] desirable for defendant to remove said oil and use the same upon its said locomotives, and that defendant will suffer severe loss if restrained or enjoined from so doing.

VI.

Defendant further alleges that said oil has a commercial value substantially in excess of the cost of producing the same, and that if defendant is permitted to remove said oil, it can sell the same commercially for large amounts of money which would be of great value and assistance to defendant in the operation of its railroad.

VII.

Defendant further alleges that the said oil contains volatile portions which can be removed by refinement and used for gasoline and other similar products, leaving a residue which is suitable for locomotive fuel, and that the greatest net proceeds and best economic results can be obtained from said oil by refining the same and by disposing of the more volatile portions commercially and using the residue as fuel oil.

Unless restrained by this Court, defendant intends to and will drill three separate wells upon said right of way, the oil produced from well number one will be sold commercially and the proceeds used in the operation of defendant's railroad. The oil produced from well number two will be refined, the more volatile portions being sold commercially and the residue being used as fuel oil upon defendant's locomotives. The oil produced from well number three will be used in its entirety as fuel oil upon defendant's locomotives.

Wherefore, defendant prays that the complaint herein be dismissed.

T. B. WEIR,
Attorney for Defendant,
Helena, Montana.

F. G. DORETY,
St. Paul, Minnesota,
WEIR, CLIFT & BENNETT,
Helena, Montana,
Of Counsel. [9]

State of Montana,
County of Lewis and Clark—ss.

John J. Mitchke, being first duly sworn, deposes and says:

That he is a citizen and resident of the State of Montana, over twenty-one (21) years of age; that on the 17th day of April, 1939, affiant deposited in the United States Post Office at Helena, Montana, a true copy of the foregoing Answer in a sealed envelope with first class postage fully prepaid, and addressed to John B. Tansil, Billings, Montana; that said John B. Tansil is attorney for plaintiff and has his office at and resides in said Billings, Montana.

That T. B. Weir is attorney for defendant in said cause and has his office in and resides at Helena, Montana, and that there is a regular communication by mail between said City of Helena, Montana,

and said City of Billings, Montana; and that affiant is in no way interested in said cause.

JOHN J. MITCHKE.

Subscribed and sworn to before me this 17th day of April, 1939.

[Seal] W. L. CLIFT,

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires Dec. 2, 1939.

[Endorsed]: Filed April 18, 1939. [10]

Thereafter, on June 19th, 1939, Notice of Motion For Leave to Intervene by Star Pointer Exploration Company, was duly filed herein, in the words and figures following, to-wit: [11]

District Court of the United States for the District of Montana, Great Falls Division.

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant,

STAR POINTER EXPLORATION COMPANY,

Intervenor.

NOTICE OF MOTION FOR LEAVE TO INTERVENE

To the United States of America, Plaintiff, and Great Northern Railway Company, Defendant, and all persons interested in the above-entitled cause:

You, and each of you, will please take notice that on Wednesday, June 21, 1939, at 10:00 A.M., in the Courtroom of the District Court [12] of the United States, in the Federal Building at Billings, Montana, the undersigned Star Pointer Exploration Company, through its undersigned Solicitors, will move the said District Court for leave to file a Petition in Intervention, Pro Interesse Suo, in the above-entitled cause.

Copy of said Petition for Leave to Intervene and Petition in Intervention is served upon you herewith.

S. F. WILSON
EDWARD J. BLOOM
Solicitors for Intervenor.

[Endorsed]: Filed June 19, 1939. [13]

Thereafter, on June 19th, 1939, Motion and Petition for Leave to Intervene by Star Pointer Exploration Company, was duly filed herein, in the words and figures following, to-wit: [14]

[Title of District Court and Cause.]

MOTION AND PETITION FOR LEAVE TO INTERVENE

Now comes Star Pointer Exploration Company, a corporation of the State of Nevada, hereinafter sometimes referred to as the Petitioner and Applicant for Intervention, and petitions this Honorable Court for [15] leave to intervene Pro Interesse Suo in the above-entitled action upon the following grounds:

I

That jurisdiction is vested in this Court under Revised Statutes, Sections 563 and 629, and amend-

ments thereto, now being Section 41, Title 28, United States Code, and Sections 723-b and 723-c, Title 28, United States Code.

II

In its complaint herein the United States of America, Plaintiff, alleges that under the Act of March 3, 1875, granting a right-of-way through the public lands of the United States to the predecessor of the Great Northern Railway Company, that said Company acquired neither the right to use any portion of said right-of-way for the purpose of drilling for and removing sub-surface oil and minerals, nor any right, title or interest in or to the mineral deposits underlying the said right-of-way, but that such minerals remained the property of the United States and subject to its control, and disposition, and that the defendant Railway Company claims and asserts ownership to the oils and minerals underlying its right-of-way and, unless restrained, will drill for and remove minerals underlying the surface of the [16] right-of-way described, depriving the United States of its property and the right thereto to its irreparable injury. And, further, that the United States has the right to dispose of the mineral oil underlying said right-of-way under the Act of May 21, 1930 (46 Stat. 373). The defendant Railway Company admits that unless it is restrained, it will drill for and remove the mineral oil underlying the surface of its right-of-way and

denies that any part thereof is the property of the United States, but is its own property.

III

Petitioner's claim hereinafter stated is adverse to Plaintiff and adverse to Defendant as to the minerals only, but relates to the subject thereof, to-wit: The title to minerals underlying a railroad right-of-way granted under the Act of Congress of March 3, 1875.

IV

Petitioner is the owner in fee of certain sections of land in Granite County, Montana, by virtue of a series of patents from the United States to its predecessors in interest. All such sections are traversed by and are subject to the right-of-way of the Northern Pacific Railway Company. Said right-of-way was granted through the public lands [17] of the United States by Plaintiff to Northern Pacific Railway Company, under the Acts of July 2, 1864, and March 3, 1875, and Acts supplementary thereto and amendatory thereof. Plaintiff's patents to Intervenor reserved neither the right-of-way by it previously granted to the Railroad Company nor the minerals underlying the said right-of-way, nor any minerals whatsoever, and as to minerals in lands so patented, your Petitioner alleges that neither the Plaintiff nor the Defendant have any right, but that said rights belong entirely to the Patentee and its successors in interest.

V

The Plaintiff and Defendant each claim title to the minerals underlying the right-of-way so granted by the Act of March 3, 1875. Intervenor avers that neither Plaintiff nor Defendant is or can be the owner of such underlying minerals because such minerals are owned by the Patentees and Grantees from the Plaintiff of fractional subdivisions of land traversed by the railroad rights-of-way, such ownership being subject, nevertheless, to the rights of the Railroad Company in the right-of-way strip as the same are conferred, and for the purposes granted, under the Acts of Congress mentioned in the complaint. [18]

VI

In principle and in fact, title to minerals estimated to exceed in value the sum of Four Million Dollars ($4,000,000) and belonging to Petitioner and underlying the right-of-way of the Northern Pacific Railway Company will be determined by the judicial construction by this Court of the Act of March 3, 1875, the same being the subject matter of consideration by this Court in the above-entitled action.

VII

New rules of civil procedure in this Court contained in Section 723-c, of Title 28, United States Code, provide, so far as pertinent to this petition, as follows:

Rule 24. Intervention.

(A) Intervention of right. Upon timely application, anyone shall be permitted to intervene in an action. * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by a judgment in the action. * * *

(B) Permissive intervention. Upon timely application anyone may be permitted to intervene. * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the Court shall [19] consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

VIII

Petitioner, the successor in interest of such Patentees and Grantees of the Plaintiff, avers that any attempted representation of its interest by Plaintiff is and will be inadequate and that in fact Plaintiff's interest is adverse to Petitioner and no representation of its interest will be made by Plaintiff, nor will Plaintiff present Petitioner's claim or legal rights to the consideration of the Court, either in whole or in part or at all, and that Petitioner is or may be bound by a judgment in the above-entitled cause to its irreparable injury. Upon all the matters and things stated herein Petitioner is entitled to intervene under new Equity Rule 24-A-2 and, further, Petitioner may be, and Petitioner re-

spectfully urges that it be, permitted to intervene (if not as a matter of right under Equity Rule 24-A-2, then) under that provision of new Equity Rule 24-B-2 quoted above which provides that intervention may be granted when applicant's claim and the main action have a question of law in common.

IX

Petitioner alleges that the [20] question of law is whether, under the Railroad Land Grant Right-of-Way Act of March 3, 1875, and Acts supplementary thereto and amendatory thereof, title to the minerals underlying rights-of-way so granted are vested in:

1. The United States, Plaintiff herein, or
2. The Railway Company, Defendant herein, or
3. The Patentee of the subdivision traversed by the right-of-way.

Petitioner and Applicant for Intervention contends that the question ought not to be determined by a consideration only of the asserted rights of Plaintiff and Defendant, that is, whether the title is vested in the United States or the Railway Company, but should be extended to that class of property owners in the situation of Petitioner, and Petitioner believes that such rights will not be stressed by either of the parties of the action; and that a full and complete judicial and equitable disposition of the pending case cannot be made without consid-

eration by this Court of the rights of that class of ownership represented by Petitioner and Applicant for Intervention.

X

Petitioner avers that the title of the United States to the minerals underlying the right-of-way, if not extinguished by the Act of March 3, 1875, was extinguished by the subsequent Act of the United States in [21] patenting the land traversed by the right-of-way to the Petitioner's predecessors in interest and that the present right of possession to said minerals in Petitioner is superior to the rights asserted in the main suit by either Plaintiff or Defendant.

XI

Petitioner avers that denial of intervention herein would constitute denial of relief to which this Petitioner is entitled in that not being fairly represented either by the Plaintiff or Defendant herein, its rights might be lost or substantially affected if intervention is not allowed by this Honorable Court.

XII

Petitioner avers that its interest in the litigation is substantial and that its attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding and expressly recognizes the jurisdiction of this Court therein, and alleges further that no remedy other than the intervention proposed herein is available for pro-

tection of Intervenor's rights to minerals underlying said railway right-of-way for the reason that the Plaintiff claims said minerals and your Petitioner is without statutory authority to litigate or quiet its title against Plaintiff in an independent suit brought for that purpose. [22]

XIII

Petitioner avers that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties hereto.

XIV

Petitioner avers that, in the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3, 1875, Defendant, the Great Northern Railway Company, interposes no objection to the granting by this Court of Petitioner's Intervention.

Wherefore, Petitioner prays this Honorable Court that its Petition for Leave to Intervene Pro Interesse Suo be granted and its Petition in Intervention be ordered filed in the above-entitled cause and that all the allegations thereof be deemed denied by both Plaintiff and Defendant herein.

Respectfully submitted,
S. P. WILSON,
EDWARD J. BLOOM,
Attorneys for Petitioner.

Duly verified.

S. P. WILSON,
Deer Lodge, Montana,
EDWARD J. BLOOM,
Wallace and San Francisco,
Attorneys for Star Pointer Exploration Company, Drummond, Montana, Petitioner, Applicant and Intervenor.

[Verified] [23]

Due and timely service of the within petition for leave to intervene and Intervention Pro Interesse Suo is hereby admitted this 22nd day of June, 1939.

JOHN B. TANSIL,
Solicitor for Plaintiff.
F. G. DORETY,
Solicitor for Defendant.

[Endorsed]: Filed June 19th, 1939. [24]

Thereafter Counsel for Star Pointer Exploration Company delivered to the Clerk of this Court a paper endorsed Intervention Pro Interesse Suo, which is in the words and figures following, to-wit: [25]

[Title of District Court and Cause.]

INTERVENTION PRO INTERESSE SUO

Now comes the above-named Intervenor, Star Pointer Exploration Company, a corporation of the State of Nevada, and files this, its Intervention Pro Interesse Suo, by its undersigned solicitors in its own behalf and for cause of action alleges: [26]

I

That Intervenor is a mining corporation organized under the laws of the State of Nevada and duly qualified and authorized to do business in the State of Montana.

II

That jurisdiction is vested in this Court in the main case under Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code, and herein under Sections 723-B and 723-C, of Title 28, United States Code.

III

That under the Acts of July 2, 1864, and March 3, 1875 (18 Stat. 482) and Acts supplementary thereto and amendatory thereof, the Northern Pacific Railroad Company, now the Northern Pacific Railway Company, was granted a right-of-way through the public lands of the United States, and said Northern Pacific Railway Company is now operating and maintaining a railroad on the right-of-way over the public lands so granted to the

Northern Pacific Railroad Company under the Acts of Congress aforesaid.

IV

That a portion of said right-of-way so granted and now in use by the Northern Pacific Railway Company in operating and [27] maintaining a railroad crosses Sections 14, 15, 16, 17, 19, 20, 21, and 22, T11N, R14W, and Sections 15, 23, and 24, T11N, R15W, N.P.N., all in Granite County, State of Montana, within the Judicial District of this Court.

V

Intervenor is the owner in fee of said Sections of land so traversed by and subject to the right-of-way of the Northern Pacific Railway Company, except as to portions of Sections 14, and Sections 15 and 22, T11N, R14W, wherein it is the owner of a leasehold in the minerals. That said Sections comprise the Hellgate Valley and the area underlying said right-of-way and coterminous with said right-of-way, contains placer gold in commercial quantities, recoverable by dredge mining methods. That under the Acts of July 2, 1864, and March 3, 1875, the Railroad Companies acquired a fee in the surface of the right-of-way and so much beneath as may be necessary for support and the right to use and possession for railroad purposes, and the right to use the right-of-way for any additional purpose so long as the use as a railroad is not interferred with or abandoned, but acquired no right, title or interest [28] in or to the mineral deposits underlying the

said right-of-way, but such minerals remained the property of the United States and subject to its control and disposition and said United States did subsequently dispose of said minerals by patent to the predecessors in interest of the Intervenor, reserving neither the right-of-way nor the minerals underlying the said right-of-way nor any minerals whatsoever.

VI

That the Plaintiff, the United States of America, claims and asserts ownership to the minerals underlying the rights-of-way granted and patented as aforesaid and claims and asserts the right to enter upon said right-of-way and dispose of a portion of said minerals through its agents or lessees under the Act of March 21, 1930. (46 Stat. 673)

VII

That the Defendant, the Great Northern Railway Company, claims and asserts ownership to the minerals underlying its right-of-way as aforesaid and the right to take and remove the same and is about to and has threatened to use portions of its right-of-way crossing the lands described in the Complaint for the purpose of drilling for and removing the [29] mineral substance lying beneath the surface of said right-of-way (oil).

VIII

That any operation or proceeding for the taking of minerals from the sub-surface of a right-of-way so granted by either the Plaintiff or Defendant

constitutes a violation of the terms and provisions of the said Act of March 3, 1875, and that thereby the Intervenor will be deprived of its property.

IX

That any claim of title to the mineral deposits underlying the said right-of-way by Plaintiff constitutes a cloud upon the patent and a claim adverse to the rights granted by Plaintiff both to Intervenor and to Defendant.

X

That title of the United States to the minerals underlying the right-of-way was extinguished, if not by the Act of March 3, 1875, by the subsequent Act of the United States in issuing patent to Intervenor's predecessors in interest, and thereby the possibility of reverter to the United States existing by reason of the limitations and reservations contained in the grant made by the Act of March 3, 1875, has been forever extinguished. [30]

Intervenor's present right of possession to the minerals underlying said rights-of-way is superior to the rights asserted in the main suit and superior to the claim of either Plaintiff or Defendant therein.

Wherefore, Intervenor prays that the prayer of Defendant in the main suit be granted and that the Complaint herein be dismissed.

S. P. WILSON
EDWARD J. BLOOM
Solicitors for Intervenor.

[Duly verified.] [31]

Thereafter, on June 22, 1939, the Court denied the Motion and Petition of the Star Pointer Exploration Company for Leave to Intervene, the Minute Entry of the record of hearing said Motion and Petition and the Order denying the same being as follows, to-wit:

[ORDER DENYING MOTION AND PETITION OF STAR POINTER EXPLORATION COMPANY FOR LEAVE TO INTERVENE.] [32]

In the District Court of the United States in and for the District of Montana.

No. 32

UNITED STATES

vs.

GREAT NORTHERN RAILWAY COMPANY.

This cause was duly called for hearing this day on the plaintiff's Motion for Judgment, and on the Motion of the Star Pointer Exploration Company for leave to intervene herein, Mr. John B. Tansil, the District Attorney, and Mr. Aubrey Lawrence, Special Assistant to the Attorney General, of Washington, D. C., appearing for the United States, Mr. F. G. Dorety, of St. Paul, Minn., appearing for the defendant, and Mr. S. P. Wilson of Deer Lodge, Montana, and Mr. Edward J. Bloom of Wallace, Idaho, appearing for said Star Pointer Exploration Company.

Thereupon, on motion of the District Attorney, court ordered that Mr. Aubrey Lawrence, Special Assistant to the Attorney General, of Washington, D. C., be admitted to practice for the purposes of this case, and that his name be entered as associate counsel for the United States.

Thereupon Mr. J. E. Corette, Jr., and Mr. L. V. Ketter, as counsel, filed and presented a notice of motion and a motion of R. J. McDonald, as trustee, for leave to intervene herein, with a complaint in intervention and an answer to plaintiff's complaint, annexed to said notice and motion, to which counsel for the United States then and there objected.

Thereupon counsel for the United States filed a written Answer and Objection to the petition of the Star Pointer Exploration Company for leave to intervene herein.

Thereupon, on motion of Mr. Corette, court ordered that the record show that the notice of motion for leave to intervene and the motion and petition of R. J. MacDonald, as Trustee, for leave to intervene, with complaint in intervention and answer attached thereto, were served on the attorneys for the United States and on the attorneys for the defendant Great Northern Railway Company before court opened this day and that the plaintiff and the defendant herein waive any further notice.

Thereupon the motion of the Star Pointer Exploration Company to intervene, and the motion of R. J. MacDonald, as Trustee, for leave to intervene,

were duly heard, argued and submitted, and by the court taken [33] under advisement until 2:00 P. M. this day.

Thereafter, at 2:00 P. M., and after due consideration, court ordered that the said petition of the Star Pointer Exploration Company for leave to intervene herein be and is denied, to which ruling of the court counsel for said Star Pointer Exploration Company then and there excepted and exception was duly noted. Thereupon on motion of counsel for said Star Pointer Exploration Company, said company was granted thirty days within which to file notice of appeal herein.

Thereupon, after due consideration, court ordered that the motion of R. J. MacDonald, as Trustee, for leave to intervene herein, be allowed tentatively and counsel were directed to file briefs thereon.

Thereupon Mr. Lawrence stated that as counsel for the United States he desired to appear specially at this time and object to the jurisdiction of the court to hear and determine the issues presented by the intervenor R. J. MacDonald, as Trustee, upon the ground that they constitute a cross bill or cause of action against the United States, to which the United States has not consented, which objection was by the court tentatively overruled. Thereupon Mr. Lawrence stated that the United States will desire to file an answer to the complaint in intervention of said R. J. MacDonald, as Trustee, and a reply to the answer of said intervenor, which

the court ordered be considered as filed at this time.

Thereupon Mr. Dorety stated that the defendant Great Northern Railway Company will desire to file an answer to the complaint in intervention of said R. J. MacDonald, as Trustee, and court ordered that said answer be considered as filed at this time.

Thereupon Mr. Corette, as counsel for R. J. MacDonald, as Trustee, moved the Court for judgment on the pleadings, with the understanding that a written motion therefor would later be filed herein this day.

Thereupon the motion of the United States for Judgment on the Pleadings and the motion of R. J. MacDonald, as Trustee, for Judgment on the Pleadings, were duly heard, argued and submitted and by the court taken under advisement.

Thereupon briefs were filed by the plaintiff and the defendant; the intervenor, R. J. MacDonald, as Trustee, was granted twenty days [34] from this date within which to file his brief and counsel for the plaintiff and defendant were granted thirty days thereafter in which to file their reply briefs.

Entered in open Court at Billings, Montana, June 22, 1939.

C. R. GARLOW,

Clerk. [35]

Thereafter, on June 22, 1939, Notice of Motion For Leave to Intervene, Motion and Petition for

Leave to Intervene, Complaint in Intervention and Answer to Plaintiff's Complaint, by Raymond J. MacDonald, as Trustee of an express trust for others, was duly filed herein, in the words and figures following to-wit: [36]

In the District Court of the United States for the District of Montana, Great Falls Division.

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant,

RAYMOND J. MacDONALD, As Trustee of an Express Trust for Others,

Intervenor.

NOTICE OF MOTION FOR LEAVE TO INTERVENE

To: The United States of America, Plaintiff, and Great Northern Railway Company, Defendant, and all persons interested in the above entitled cause.

You, and each of you, will please take notice that, on Thursday, June 22nd, 1939, at 10:00 o'clock A. M., in the Court Room of the above entitled Court in the Federal Building at Billings, Montana, the un-

dersigned, Raymond J. MacDonald, as Trustee of an express trust for others, through his undersigned solicitors, will move the above entitled Court for leave to file a Petition in Intervention in the above entitled cause.

A copy of said Petition for Leave to Intervene and of the proposed Complaint in Intervention of Raymond J. MacDonald, as such Trustee, is served upon you, herewith.

W. H. HOOVER
J. E. CORETTE, JR.
L. V. KETTER
Solicitors for Intervener. [37]

[Title of District Court and Cause.]

MOTION AND PETITION FOR LEAVE TO INTERVENE

Comes now, Raymond J. MacDonald, as Trustee of an Express Trust for others, hereinafter sometimes referred to as the "Petitioner", and moves and petitions the above entitled Court for leave and permission to intervene in the above entitled action upon the following grounds:

I.

That jurisdiction is vested in this Court under Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code Annotated.

II.

Petitioner's claim, as hereinafter stated, is in agreement with Plaintiff's claim and contention to the extent that Plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any way using the right of way which was granted to it by the Act of March 3rd, 1875, for the purpose of drilling for and removing oil, gas and minerals underlying this right of way, and [38] that a permanent injunction issue restraining the Defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way crossing any part of the SW¼ of Section 17, Township 33 North, Range 5 West, Glacier County, Montana, which is a part of the land described in Plaintiff's Complaint in the above entitled action, but Petitioner's claim is adverse to Plaintiff's contention and claim as to the present ownership of the minerals located underneath the right of way of the Defendant, Great Northern Railway Company, where that right of way crosses the NE¼ of the said SW¼ of said Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana. Petitioner's claim is adverse to the claim of the Defendant, Great Northern Railway Company, in that said Defendant and Petitioner each claim title to the oil, gas and minerals underneath the said right of way of the Defendant across the NE¼ SW¼ of said Section 17.

III.

That by a declaration of trust in writing, dated September 18th, 1934, and executed by him, the above named intervener stated and declared that he holds the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6¼% landowners' royalty of all the oil, gas and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all moneys received by him as royalty payments, or otherwise, for and on account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses of the administration of said trust. That said declaration of [39] trust has not been cancelled or terminated, and it is still in full force and effect, and the said intervener, as such trustee, at all times since the date of said declaration of trust, has held, and does yet hold, the aforesaid land, and the said royalty interest, as such trustee.

IV.

That on or about July 11th, 1910, one Lemuel J. Hawkins made a homestead entry under the Act of May 20th, 1862, of the Congress of the United States, and Amendments thereto, on the whole of the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana,

and that thereafter a patent to the whole of said SW¼ of said Section 17 was duly issued and delivered by the United States of America to the said Lemuel J. Hawkins, which patent is dated January 23rd, 1914. That intervener is the successor in interest of the said Lemuel J. Hawkins, the patentee to said SW¼ of said Section 17, except to a 6¼% royalty of the oil, gas and other minerals beneath the surface of said described premises.

V.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the said SW¼ of said Section 17 was granted to the said patentee, Lemuel J. Hawkins, subject to the right of way of the Defendant, Great Northern Railway Company, over the said NE¼ of said SW¼ of said Section 17. That said patent did not contain any exception or reservation of the oil, gas or other minerals in or under the said SW¼ of said Section 17, or any part thereof.

VI.

The Plaintiff and Defendant each claim title to the minerals underlying the right of way of the Defendant over the [40] NE¼ of the said SW¼ of said Section 17, which right of way was granted by the Act of March 3rd, 1875, as alleged in the Complaint. Intervener alleges that neither Plaintiff nor the Defendant is or can be the owner of such oil, gas and other minerals underlying the

right of way of the Defendant over the NE¼ of the said SW¼ of said Section 17, and that such oil, gas and other minerals are owned by the Intervener herein as the successor in interest of Lemuel J. Hawkins, the patentee of said SW¼ of said Section 17.

VII.

The interest of this Intervener will not be fully and adequately presented to the above entitled Court in the above entitled cause by the Plaintiff and the Defendant therein, and this intervener is so situated as to be adversely affected by a decision of the above entitled cause, if such a decision were arrived at without the Complete and adequate presentation of the interests of this intervener and without the consideration by the Court of those interests.

VIII.

The claim of the intervener involves questions of law which are the same as the questions of law involved in the above entitled cause between the Plaintiff and Defendant therein, and the intervener's claim and the above entitled action between the Plaintiff and the Defendant have questions of law in common. The Intervener is entitled to intervene under the provisions of Rule 24, subsections a and b, of the Rules of Civil Practice for the District Courts of the United States.

IX.

The question of law involved in the above entitled action is whether, under the Railroad Land

Grant Right of Way Act of [41] *of* March 3rd, 1875, and acts supplemental thereto and amendatory thereof, title to the minerals underlying right of way so granted are vested:

1st. In the United States, the Plaintiff herein, or

2nd. In the Defendant herein, the Great Northern Railway Company, or

3rd. In this Petitioner, as the successor in interest of a patentee of a subdivision over which the right of way passes.

These questions ought not to be determined by a consideration only of the asserted rights of the Plaintiff and Defendant herein, but should be determined after a consideration of the rights of this intervener and other patentees or their successors in interest who have similar rights to those of this Petitioner, and Petitioner believes that the Plaintiff and the Defendant herein have no reason to stress and will not stress the rights of this Petitioner or of parties similarly situated, and that a full and complete judicial and equitable disposition of the pending case cannot be made without consideration by this Court of the rights of this Petitioner and other persons having similar rights to this Petitioner.

X.

The title of the United States to the minerals underlying the right of way of the Great Northern Railway Company, where that right of way crosses

over the said SW¼ of said Section 17, was extinguished by the subsequent Act of the United States in granting, issuing and delivering the patent to Lemuel J. Hawkins, covering the whole of said SW¼ of said Section 17, as hereinbefore set forth.

XI.

That denial of intervention would constitute denial [42] of relief to which this Petitioner is entitled, in that this Petitioner's rights might be lost or substantially affected, if intervention is not allowed by this Court and if the rights of this Petitioner and of other parties having similar rights are not fully and completely presented to the Court in the above entitled cause.

XII.

Petitioner avers that his interest in the litigation is substantial and that his attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding and expressly recognizes the jurisdiction of this Court therein, and alleges further that no remedy other than the intervention proposed herein is available for protection of intervener's rights to minerals underlying said railway right of way for the reason that the Plaintiff claims said minerals, and your Petitioner is without statutory authority to litigate or quiet his title against Plaintiff in an independent suit brought for that purpose.

XIII.

Petitioner avers that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties hereto.

XIV.

Petitioner avers that, in the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3rd, 1875, Defendant, the Great Northern Railway Company, interposes no objection to the granting by this Court of Petitioner's Intervention. [43]

Wherefore, Petitioner prays that this Motion and Petition for Leave and Permission to Intervene in the above entitled action be granted and that this Petitioner's Complaint in Intervention, which is attached hereto, and Intervener's Answer to Plaintiff's Complaint, which is attached hereto, each be ordered filed in the above entitled cause, and that the Defendant, Great Northern Railway Company, be required to answer this Petitioner's said Complaint in Intervention.

Respectfully submitted,
W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.,
Attorneys for Petitioner. [44]

[Title of District Court and Cause.]

INTERVENER'S COMPLAINT IN INTERVENTION

Comes now the above named Intervener and, by leave of court first had and obtained, for his cause of action against the above named defendant, complains and says:

I.

That the grounds upon which the jurisdiction of this court depends are:

(1) That the court already has jurisdiction, the action in which this intervention is made, having been brought by the United States of America.

(2) That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00, and arises under the laws of the United States and between citizens of different states.

II.

That by a declaration of trust in writing dated September 18, 1934, and executed by him, the above named Intervenor stated and declared that he holds the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6¼% landowners royalty of all the oil, gas, and other [45] minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all monies received by him as royalty payments, or otherwise, for and on account of said lands and roy-

alty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses of the administration of said trust. That said declaration of trust has not been cancelled or terminated, and it is still in full force and effect, and the said intervener, as such trustee, at all times since the date of said declaration of trust, has held, and does yet hold, the aforesaid land, and the said royalty interest, as such trustee.

III.

That this intervener is a citizen of the State of Montana.

IV.

That the above named defendant is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, with its principal office and place of business at St. Paul, Minnesota.

V.

That under and pursuant to the provisions of the act of March 3, 1875 of the Congress of the United States (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the United States Code Annotated), the St. Paul, Minneapolis, and Manitoba Railway Company, a railroad corporation, predecessor in interest of the above named defendant, Great Northern Railway Company, having theretofore filed with the Secretary of the Interior

a copy of its Articles of Incorporation, and due proofs of its organization under the same, did on or about the 23rd day of January, 1891, file with the Register of the Land Office at Helena, Montana, in the District where the land was located, a [46] profile of a certain section of twenty miles of its railroad as it was therefore located across public lands in said district.

VI.

That said railroad as so located and indicated on said profile crossed the Northeast Quarter of the Southwest Quarter (NE¼ SW¼) of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana, and other public lands.

VII.

That the construction of said section of railroad was completed, and the same is now a part of the main line of railroad maintained and operated by the above named defendant from St. Paul, Minnesota, to the Pacific Coast.

VIII.

That by virtue of the aforesaid act of Congress and compliance therewith by the said predecessor of the above named defendant, a right of way 100 feet wide on each side of the central line of said railroad as it passed over the public lands hereinbefore described, was granted to said railway company, and the above described lands were by said

act required to be thereafter disposed of subject to such right of way.

IX.

That thereafter, to-wit: On or about the 11th day of October, 1907, the said predecessor in interest of the above named defendant, transferred and conveyed to the said defendant all its property, including the said right of way over the lands hereinabove described, and the said defendant, ever since said date, has maintained and operated its main line of railroad upon its said right of way as it passes over the above described land.

X.

That after the filing of said profile, and after the construction of said section of railroad, to-wit, on or about July 11, 1910, one Lemuel J. Hawkins made homestead entry under the act [47] of May 20, 1862 of the Congress of the United States, and amendments thereof, on the whole of the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana, which included the Northeast Quarter (NE¼) of said quarter section over which the said right of way of the defendant passes.

XI.

That thereafter, a patent to the whole of the said SW¼ of said Section 17, Township 33 North, Range 5 West, M.M., was duly issued and delivered by the United States of America to the said entry-

man, which patent is dated January 23, 1914, and a copy of which is hereto attached and marked Exhibit "A", to which reference is hereby made.

XII.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the aforesaid quarter section, was granted to the patentee subject to said right of way over the said Northeast Quarter (NE¼) of said quarter section of said patented land.

XIII.

That said patent did not contain any exception or reservation of the oil, gas, or other minerals in or under the patented lands, or any part thereof, and all the oil, gas, and other minerals therein and thereunder were, by said patent, granted by the United States of America to the said patentee, as a part of said lands, and the said patentee thereby became the owner of, and entitled to the possession of, said oil, gas and other minerals.

XIV.

That thereafter, and while he was still the owner of the aforesaid lands and the oil, gas, and other minerals therein contained, the said patentee died, and such proceedings were had in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, in the matter of the [48] estate of Lemuel J. Hawkins, de-

ceased, then and therein said court pending, that a Decree of Distribution was duly and regularly made by said court in said matter on the 26th day of January, 1931, by which the above described quarter section of land was distributed to Clissie A. Hawkins, widow of the said Lemuel J. Hawkins, deceased. That a certified copy of said Decree of Distribution was duly recorded in the office of the County Clerk and Recorder of Glacier County, Montana, in Book #1 of Orders and Decrees at page 85.

XV.

That thereafter, and while she was still the owner of said quarter section of land, the said Clissie A. Hawkins made, executed and delivered to Louis B. O'Neill an oil and gas lease covering the whole of said quarter section, and which, by mesne assignments, has been transferred and is now owned and held by Glacier Production Company, a corporation. That said oil and gas lease is dated October 15, 1931 and was recorded in the office of the County Clerk and Recorder of Glacier County, Montana, on June 9, 1932, in Book 3 of Oil and Gas Leases at page 559.

XVI.

That under and by virtue of the terms of said oil and gas lease, the said land was leased for oil and gas mining purposes, for a period of ten (10) years from its date and so long thereafter as oil or gas is produced from the land by the lessee or his

assigns, and the lessor reserved a royalty of 1/8th of the oil produced and saved from said land, and a royalty of the market price at the well of 1/8th the gas produced and sold or used off said land or in the manufacture of gasoline.

XVII.

That the said oil and gas lease is still in force and effect. [49]

XVIII.

That thereafter, by a deed dated May 31st, 1934, and recorded June 4, 1934, in Book 10 of Deeds at page 267 in the office of the County Clerk and Recorder of Glacier County, Montana, the said Clissie A. Hawkins, who was still then and there the owner of said quarter section of land, subject to said oil and gas lease, conveyed the same and the whole thereof, to Raymond J. MacDonald, Trustee, and intervener herein, subject to said oil and gas lease, but excepting and reserving 6¼% royalty of the oil, gas and all minerals beneath the surface of said described premises.

XIX.

That the intervener now, and at all times since the said conveyance to him, owns the said land, as trustee under the declaration of trust aforesaid, and all the oil, gas, and other minerals therein, except 6¼% royalty, as reserved in said deed by the grantor therein.

XX.

That the above named defendant has no right, title, or interest to or in the oil, gas, and other minerals under or beneath the surface of the part of the said NE¼ SW¼ of said Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, that is within the 200 foot limits of said right of way.

XXI.

That the sum or value of the last mentioned oil, gas, or other minerals exceeds the sum of $3000.00.

XXII.

That the oil and gas, and other minerals, or either of them, beneath the surface of the land within said right of way limits are not a part of defendant's said right of way, and that the same can be withdrawn or extracted therefrom by wells drilled [50] on intervener's said quarter section, but off of said right of way, without injury to said right of way, and without interfering with the use thereof by the defendant for a railroad right of way.

XXIII.

That the defendant, Great Northern Railway Company, claims to be the owner of the oil and gas under or beneath the surface of the part of the said NE¼ SW¼ of Section 17, Township 33 North, Range 5 West, M.M., that is within the 200 foot limits of said right of way, and threatens to and will, unless restrained by this court, drill wells

thereon and take, extract, remove and appropriate the same to its own use, and threatens so to do, and will deprive this intervener of the same and the royalties to which he is entitled under the oil and gas lease aforesaid, and of his reversionary right in and to said oil and gas, if such lease should become forfeited or cancelled, all to his irreparable damage and injury.

XXIV.

That the intervener has no plain, speedy, or adequate remedy in the ordinary course of the law.

Wherefore, intervener prays that the defendant, Great Northern Railway Company, be required to answer this complaint in intervention; that a permanent injunction be issued, restraining and enjoining it from, in any manner, drilling for oil, gas, or other minerals on its right of way as it crosses the lands hereinbefore described, and from extracting, removing, and appropriating to its own use the said oil, gas, and other minerals; and that the intervener have and recover of the said defendant its costs and disbursements herein incurred.

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.,
Attorneys for Intervener. [51]

"EXHIBIT A"

3547

Transcribed from Teton County Records. Patent Record 6-G, page 124 Compared.

Great Falls 013718

The United States of America

To All to Whom These Presents Shall Come, Greetings:

Whereas, a Certificate of the Register of the Land Office at Great Falls, Montana, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settler on the Public Domain" and the acts supplemental thereto, the claim of Lemuel J. Hawkins has been established and duly consummated, in conformity to law, for the southwest quarter of Section seventeen in Township thirty-three north of Range five west of the Montana Meridian, Montana, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General:

Now know ye, that there is, therefore, granted by the United States unto the said claimant the tract of land above described; To have and to hold the said tract of land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to

ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. Given under my hand, at the City of Washington, the Twenty-Third day of January in the year of our Lord one thousand nine hundred and Fourteen and of the Independence of the United States the one hundred and Thirty-Eighth.

By the President
WOODROW WILSON.
By M. P. LeROY,
Secretary. [52]

(General Land Office Seal)

L. Q. C. LAMAR
Recorder of the General Land Office

Recorded: Patent Number 379868

Filed for record Feb. 1 A.D. 1918 at 9 o'clock A.M. (No. 69161)

E. C. GARRETT,
County Recorder
McS.
By Deputy

State of Montana
County of Glacier—ss.

I, J. Lee Anderson, County Clerk and Ex-Officio Recorder in and for said County of Glacier, State of Montana, do hereby certify that the above and foregoing is a full, true and correct copy and the whole thereof, of an original Patent filed in my office on the 1st day of February A.D. 1918 at 9:00 o'clock A.M., and now remaining therein as Document No. 69161.

In witness whereof, I have hereunto set my hand and affixed my Official Seal at Cut Bank, Montana, this 3rd day of June A. D. 1939.

[Seal] J. LEE ANDERSON
County Recorder
By FLORENCE WALFORD
Deputy [53]

[Title of District Court and Cause.]

INTERVENER'S ANSWER TO PLAINTIFF'S COMPLAINT

Comes now the above named Intervener and, by leave of Court first had and obtained, for his answer to the Complaint of the above named Plaintiff in the above entitled action, answers and says:

I.

That by a Declaration of Trust, in writing, dated September 18th, 1934, and executed by him, the

above named Intervener stated and declared that he holds the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, together with 6¼% landowner's royalty of all the oil, gas and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all moneys received by him as royalty payments, or otherwise, for and an account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the dedeuction of reasonable and necessary expenses of the administration of said Trust. That said Declaration of Trust has not [54] been cancelled or terminated, and it is still in full force and effect, and the said Intervener, as such Trustee, at all times since the date of said Declaration of Trust has held, and does yet hold, the aforesaid land, and the said royalty interest, as such Trustee.

II.

That the NE¼ of said SW¼ of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, is a part of the lands over which it is alleged in Plaintiff's Complaint that the right of way of the Defendant, Great Northern Railway Company, passes and which it is alleged therein was granted to its predecessor in interest under the Act of Congress of March 3rd, 1875, (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the U.S.C.A.).

III.

That the Intervener admits the allegations of paragraphs I, II, III, IV, V, VI, VIII, and IX of said Complaint.

IV.

Answering Paragraph VII of said Complaint, the Intervener denies that the oil underlying the surface of the right of way as it crosses the above described lands owned by this Intervener, is the property of the Plaintiff, that it has any right thereto, or will suffer irreparable injury if the Defendant railroad company is not restrained or enjoined from drilling for and removing the oil underlying the surface of said right of way as it crosses the property of the Intervener above described.

Further answering said complaint, and as an affirmative and separate defense thereto, the Intervener alleges:

I.

That by a Declaration of Trust, in writing, dated September 18th, 1934, and executed by him, the above named Intervener stated and declared that he holds the said Southwest [55] Quarter (SW¼) of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6¼% landowner's royalty of all the oil, gas, and other minerals beneath the surface of said premises, in trust for various and numerous persons and corporations named therein, and that all moneys re-

ceived by him as royalty payments or otherwise for and on account of said lands and royalty interest so held by him in trust are to be paid to the various and numerous persons named therein, as beneficiaries of said Trust, after the deduction of reasonable and necessary expenses of the administration of said Trust. That said Declaration of Trust has not been cancelled or terminated, is still in full force and effect, and the said Intervener, as such Trustee, has at all times since the date of said Declaration of Trust held, and does yet hold, the aforesaid land, and the said royalty interest, as such Trustee, and as such is the owner thereof.

2.

That under and pursuant to the provisions of the Act of March 3rd, 1875 of the Congress of the United States (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the United States Code Annotated), the St. Paul, Minneapolis, and Manitoba Railway Company, a railroad corporation, predecessor in interest of the above named Defendant, Great Northern Railway Company, having theretofore filed with the Secretary of the Interior a copy of its Articles of Incorporation, and due proofs of its organization under the same, did on or about the 23rd day of January, 1891, file with the Register of the Land Office at Helena, Montana, in the District where the land was located, a profile of a certain section of twenty (20) miles of its railroad

as it was theretofore located across public lands in said district. [55A]

3.

That said railroad, as so located and indicated on said profile, crossed the Northeast Quarter of the Southwest Quarter (NE¼SW¼) of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, and other public lands.

4.

That the construction of said section of railroad was completed, and the same is now a part of the main line of railroad maintained and operated by the above named defendant from St. Paul, Minnesota, to the Pacific Coast.

5.

That by virtue of the aforesaid Act of Congress and compliance therewith by the said predecessor of the above named Defendant, a right of way 100 feet wide on each side of the central line of said railroad as it passes over the public lands hereinbefore described, was granted to said Railway Company, and the above described lands were by said Act required to be thereafter disposed of, subject to such right of way.

6.

That thereafter, to-wit: on or about the 11th day of October, 1907, the said predecessor in interest of

the above named Defendant, transferred and conveyed to the said Defendant all its property, including the said right of way over the lands hereinabove described, and the said Defendant, ever since said date, has maintained and operated its main line of railroad upon its said right of way as it passes over the above described land.

7.

That after the filing of said profile, and after the construction of said section of railroad, to-wit: on or about July 11th, 1910, one Lemuel J. Hawkins made homestead entry under the Act of May 20th, 1862, of the Congress of the [56] United States, and amendments thereto, on the whole of the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, which included the Northeast Quarter (NE¼) of said quarter section over which the said right of way of the Defendant passes.

8.

That thereafter, a patent to the whole of the said SW¼ of said Section 17, Township 33 North, Range 5 West, M. M., was duly issued and delivered by the United States of America to the said entryman, which patent is dated January 23rd, 1914, and a copy of which is hereto attached and marked Exhibit "A," to which reference is hereby made.

9.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the

aforesaid quarter section was granted to the patentee subject to said right of way over the said Northeast Quarter (NE¼) of said quarter section of said patented land.

10.

That said patent did not contain any exception or reservation of the oil, gas, or other minerals in or under the patented lands, or any part thereof, and all the oil, gas and other minerals therein and thereunder were by said patent granted by the United States of America to the said patentee, as a part of said lands, and the said patentee thereby became the owner and entitled to the possession of said oil, gas and other minerals, and the Plaintiff, since the issuance of said patent, has not had, nor has it now, any right, title or interest therein.

11.

That thereafter, and while he was still the owner of the aforesaid lands and the oil, gas and other minerals there- [57] in contained, the said patentee died, and such proceedings were had in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, in the matter of the Estate of Lemuel J. Hawkins, Deceased, then and there in said Court pending, that a Decree of Distribution was duly and regularly made by said Court in said matter on the 26th day of January, 1931, by which the above described quarter section of land was distributed to Clissie

A. Hawkins, widow of the said Lemuel J. Hawkins, Deceased. That a certified copy of said Decree of Distribution was duly recorded in the Office of the County Clerk and Recorder of Glacier County, Montana, in Book 1 of Orders and Decrees, at page 85.

12.

That thereafter, and while she was still the owner of said quarter section of land, the said Clissie A. Hawkins made, executed and delivered to Louis B. O'Neill an Oil & Gas Lease covering the whole of said quarter section, and which, by mesne assignments, has been transferred and is now owned and held by Glacier Production Company, a corporation. That said Oil & Gas Lease is dated October 15th, 1931, and was recorded in the Office of the County Clerk & Recorder of Glacier County, Montana, on June 9th, 1932, in Book 3 of Oil & Gas Leases, at page 559.

13.

That under and by virtue of the terms of said Oil & Gas Lease, the said land was leased for oil and gas mining purposes for a period of ten (10) years from its date and so long thereafter as oil, or gas is produced from the land by the Lessee or his assigns, and the Lessor reserved a royalty of one-eighth of the oil produced and saved from said land, and a royalty of the market price at the well of one-eighth of the gas produced and sold or used off said land or in the manufacture of gasoline. [58]

14.

That the said Oil & Gas Lease is still in force and effect.

15.

That thereafter, by a Deed dated May 31st, 1934, and recorded June 4th, 1934, in Book 10 of Deeds, at page 267, in the Office of the County Clerk & Recorder of Glacier County, Montana, the said Clissie A. Hawkins, who was still then and there the owner of said quarter section of land, subject to said oil and gas lease, conveyed the same and the whole thereof, to Raymond J. MacDonald, Trustee, and intervener herein, subject to said Oil & Gas Lease, but excepting and reserving 6¼% royalty of the oil, gas and other minerals beneath the surface of said described premises.

16.

That the said intervener now, and at all times since the said conveyance to him, owns the said land, as Trustee under the Declaration of Trust aforesaid, and all the oil, gas and other minerals therein, except 6¼% royalty, as reserved in said Deed by the Grantor therein.

17.

That neither the above named Plaintiff nor the above named Defendant has any right, title, or interest to or in the oil, gas and other minerals in, under, or beneath the surface of the part of the said NE¼SW¼ of said Section 17, Township 33

North, Range 5 West, M. M., Glacier County, Montana, that is within the said right of way limits.

18.

That the oil and gas, and other minerals, or either of them, beneath the surface of the land within said right of way limits are not a part of Defendant's said right of way, and that [59] the same can be withdrawn or extracted therefrom by wells drilled on Intervener's said quarter section, but off of said right of way, without injury to said right of way, and without interfering with the use thereof by the Defendant for a railroad right of way.

Wherefore, having fully answered the Plaintiff's Complaint, the Intervener prays that the Plaintiff take nothing by his said action insofar as the claim to relief is based upon Plaintiff's claim of ownership of the oil, gas and other minerals beneath the surface of the right of way.

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.
Attorneys for Intervener

[Endorsed]: Filed June 22, 1939. [60]

Thereafter, on July 17, 1939, Notice of Appeal was duly filed herein, in the words and figures following, towit: [61]

In the District Court of the United States in and for the District of Montana, Great Falls Division

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

STAR POINTER EXPLORATION COMPANY,

Intervenor,

RAYMOND MacDONALD, As Trustee of an Express Trust for Others,

Intervenor.

NOTICE OF APPEAL.

To the above named Plaintiff and to John B. Tansil, Esq., and Aubrey Lawrence, Esq., Its Attorneys, and to the above named Defendant, and to F. G. Dorety and Weir, Clift & Bennett, Its Attorneys, and to Raymond J. MacDonald, As Trustee of an Express Trust for Others, Intervenor, and his Attorneys, W. H. Hoover, Esq., L. V. Ketter, Esq., and J. E. Corrette, Jr., Esq., and to all persons interested in the above entitled *cuase*:

You, and each of you, will please take notice, and notice is hereby given that Star Pointer Exploration Company, above named as intervenor, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above cause on the 22nd day of June, 1939, the Hon. Charles H. Pray presiding, and in which Star Pointer Exploration Company was refused and denied the right to intervene in said action, and [62] Star Pointer Exploration Company herein appeals from the judgment dismissing it from said action. Said judgment being entered in this action on June 22nd, 1939, and denying to Star Pointer Exploration Company the right to intervene in said action.

Dated this 14th day of July, 1939.

EDWARD J. BLOOM
1406 Hobart Building,
San Francisco, California.
S. P. WILSON
Deer Lodge, Montana
Attorneys for Appellant,
Star Pointer Exploration
Company.

[Endorsed]: Filed July 17, 1939. [63]

Thereafter, on July 17, 1939, Bond on Appeal was duly filed herein, in the words and figures following, towit: [64]

In the District Court of the United States in and for the District of Montana, Great Falls Division

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

STAR POINTER EXPLORATION COMPANY,

Intervenor,

RAYMOND MacDONALD, As Trustee of an Express Trust for Others,

Intervenor.

BOND ON APPEAL.

Whereas, Star Pointer Exploration Company, a Corporation, designated as Intervenor, is about to appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, from an order rendered against it in said action, and a judgment in said action refusing and denying said Star Pointer Exploration Company the right to intervene in said action, which said order and judgment was made and rendered upon the 22nd day of June, 1939.

Now, therefore, in consideration of the premises and of such appeal, Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to do business in the State of Montana, does hereby undertake and promise on the part of the appellant that said appellant will pay the costs which may be awarded against [65] it on the appeal, if the appeal is dismissed or the judgment affirmed and such costs as the appellant court may award if the judgment is modified, not exceeding $250.00, in which amount said Fidelity and Deposit Company of Maryland does hereby acknowledge itself to be bound.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
[Corporate Seal) By A. A. MALCOLM
Agent.
By S. P. WILSON
Attorney-in-Fact.

[Endorsed]: Filed July 17, 1939. [66]

Thereafter, on August 1, 1939, settlement of Proposed Bill of Exceptions of Star Pointer Exploration Company, came on for hearing, the minute entry thereof being as follows, to-wit: [67]

[Title of Cause.]

This cause was duly called for hearing this day on the Proposed Bill of Exceptions of Star Pointer

Exploration Company, Mr. John B. Tansil, United States District Attorney, appearing for the Plaintiff, and Mr. S. P. Wilson appearing for Star Pointer Exploration Company.

Thereupon by agreement of counsel court ordered that the proposed bill of exceptions be amended to include the plaintiff's complaint, and the answer of the defendant Great Northern Railway Company herein, by reference, and insertion in the copy of said bill of exceptions, to be included in the transcript on appeal herein, of said pleadings.

Thereupon the Bill of Exceptions as amended was signed, settled and allowed by the court and ordered filed.

Entered in open court at Great Falls, Montana, August 1, 1939.

C. R. GARLOW,
Clerk. [68]

Thereafter, on August 1, 1939, Bill of Exceptions of Star Pointer Exploration Company, as settled and allowed by the court was duly filed herein, in the words and figures as follows, to-wit: [69]

[Title of District Court and Cause.]

DRAFT OF PROPOSED BILL OF EXCEPTIONS OF STAR POINTER EXPLORATION COMPANY TO THE RULING, DECISION AND ORDER OF THE COURT DENYING STAR POINTER EXPLORATION COMPANY PERMISSION TO INTERVENE.

Be it remembered: Plaintiff's complaint in this cause was filed upon March 23, 1939, and is in words and figures as follows:

[Note: The complaint here referred to is set out at page 2 of this printed record and is here omitted to avoid duplication.] [70]

Thereafter upon April 18, 1939, Defendant filed its Answer which Answer is in words and figures as follows:

[Note: The answer here referred to is set out at page 7 of this printed record and is here omitted to avoid duplication.] [73]

That after the filing of plaintiff's complaint in this action and the answer of defendant, Great

Northern Railway Company, a corporation, Star Pointer Exploration Company did serve upon the defendant in said action and upon the plaintiff in said action its motion and petition for leave to intervene in said action together with notice of its motion for leave to intervene said motion and petition for leave to intervene being in words and figures as follows:

[Note: Motion and petition to intervene, here referred to is set out at page 13 of this printed record and is here omitted to avoid duplication.] [76]

Star Pointer Exploration Company did give notice to the Plaintiff in said action and defendant in said action that said application and petition to intervene would be presented to the above court, said notice being in words and figures as follows:

[Note: Notice of motion for leave to intervene here referred to is set out at page 12 of this printed record and is here omitted to avoid duplication.] [82]

At the same time Star Pointer Exploration Company did serve upon the plaintiff and upon the defendant its complaint in intervention, Pro Interesse Suo, the same being in words and figures as follows:

[Note: Complaint in intervention, Pro Interresse Suo here referred to is set out at page 22 of this

printed record and is here omitted to avoid duplication.] [83]

Thereafter, to-wit, June 22, 1939, at the court room, Billings Division, Billings, Montana, said petition and motion of Star Pointer Exploration Company to intervene in said action came on regularly for hearing at the opening of court before the Hon. Charles N. Pray, Judge, John B. Tansil, Esq., and ———— Lawrence, Esq., appearing as counsel for Plaintiff, F. G. Dorety appearing as counsel for Defendant, L. V. Ketter, Esq. and J. E. Corette, Jr. appearing as counsel for Raymond J. MacDonald, as Trustee of an Express Trust for Others, as intervenor and S. P. Wilson, Esq. and Edward J. Bloom, Esq. appearing as counsel for petitioners, Star Pointer Exploration Company. The objection of plaintiff to the application of Star Pointer Exploration Company to intervene was served upon counsel for Star Pointer Exploration Company and filed, the same being in words and figures as follows: [86]

[Title of District Court and Cause.]

ANSWER

Comes now the plaintiff, the United States of America, and for answer to the Motion and Petition for Leave to Intervene of the Star Pointer Exploration Company, a Corporation, objects to the said Motion and Petition for Leave to Intervene and to the jurisdiction of the Court to hear and

determine the same or to grant the said Motion upon the following grounds and for the following reasons:

I

That the intervenor is not a party permitted under Rule 24 of the Rules of Civil Procedure to intervene, either as of right or by permission of the Court.

II

That the Petition and Complaint in Intervention fails to state a cause of action.

III

That the intervenor seeks to enlarge the issues of the action as made by the pleadings between the plaintiff and the defendant. [87]

IV

That the intervenor has no interest in the subject matter of the action.

V

That the intervenor seeks to secure a declaratory judgment against the United States and that the Court has no jurisdiction to grant such declaratory judgment.

VI

That if the Complaint or Petition in Intervention is allowed, it will constitute a suit against the United States brought without its consent.

VII

That a judgment in the action will not bind the intervenor and will not prejudice his interests or rights.

VIII

That the Court is without jurisdiction to make the United States a party defendant to a cross bill sought to be filed by the intervenor.

Dated this 21st day of June, 1939.

(Signed) JOHN B. TANSIL.
United States Attorney.
(Signed) ROY F. ALLAN
Assistant U. S. Attorney
(Signed) AUBREY LAWRENCE
Special Assistant to
The Attorney General. [88]

Thereupon the application of Star Pointer Exploration Company to intervene and objections thereto were duly argued to the court by the respective counsels and were submitted to the court for decision and the court did then and there, to-wit, upon June 22, 1939, deny the application and petition of Star Pointer Exploration Company to intervene and did refuse permission to intervene, to which ruling of the court Star Pointer Exploration Company by its counsel then and there excepted and was given an exception.

Thereupon the court made an order giving and granting the Star Pointer Exploration Company thirty days from and after June 22, 1939, in which time to serve and file herein a draft of its proposed bill of exceptions to the ruling and decision and order of the court.

And now within the time allowed by law, Star Pointer Exploration Company files its draft of proposed bill of exceptions and asks that the same be settled and allowed and filed in the above court in the above cause.

EDWARD J. BLOOM and
S. P. WILSON
Attorneys for Star Pointer
Exploration Company

I, Charles N. Pray, Judge, do hereby certify that the foregoing bill of exceptions of Star Pointer Exploration Company is true and correct and the same is now here by me settled and allowed and is ordered filed by the clerk in the above court in the above cause.

Dated this 1st, day of Aug. 1939.

CHARLES N. PRAY
Judge.

[Endorsed]: Lodged in Clerk's Office, July 5, 1939. Filed August 1, 1939. [89]

Thereafter, on August 1, 1939, Order Extending Time to Docket Appeal was duly filed herein, the original order being hereto annexed and being as follows to-wit: [90]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET APPEAL

Upon Motion and Application of S. P. Wilson, one of the attorneys for Star Pointer Exploration Co., and it appearing a proper case for the making of this order:

It is ordered that Star Pointer Exploration Co. be, and it hereby is, given and granted to and including fifty days from the 17th day of July, 1939, in which time to cause its appeal herein to be docketed in the Circuit Court of Appeals for the Ninth Circuit.

Dated the 1st day of August, 1939.

CHARLES N. PRAY
Judge

[Endorsed]: Filed August 1, 1939. [91]

Thereafter, on August 1, 1939, Praecipe for Transcript on Appeal was duly filed herein, being in the words and figures following, towit: [93]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal taken in the above entitled cause and incorporate in such transcript of record the following papers, to-wit:

1. Complaint.
2. Notice of Motion by Star Pointer Exploration Co. for leave to intervene.
3. Motion and Petition of Star Pointer Exploration Co. for leave to intervene.
4. Intervention Pro Intresse Suo.
5. Separate answer of Great Northern Railway Co.
6. Notice of motion of Raymond J. MacDonald as Trustee of an Express Trust for Others, Intervener.
7. Motion and Petition of Raymond J. MacDonald as Trustee of an Express Trust for Others, Intervener, for leave to intervene.
8. Complaint in intervention of Raymond J. MacDonald as Trustee of an Express Trust for Others, Intervener.
9. Bill of exceptions of Star Pointer Exploration Co. settled and approved herein.

10. Order, decision, and judgment of the Court refusing and denying Star Pointer Exploration Company permission to intervene. [94]

11. Notice of appeal of Star Pointer Exploration Co. and Bond on Appeal.

12. This praecipe with proof of service.

Said transcript to be prepared and duly certified by you as required by law and the rules of the above-entitled court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this first day of August, 1939.

S. P. WILSON.
EDWARD J. BLOOM.
Attorneys for Star Pointer Exploration Company.

Service of foregoing Praecipe and receipt of copy of same acknowledged this 1st day of August, 1939.

JOHN B. TANSIL,
U. S. District Atty. and
Attorney for Plaintiff.

[Endorsed]: Filed August 1, 1939 [95]

Thereafter, on August 7, 1939,

AFFIDAVIT OF MAILING COPY OF PRAECIPE

for transcript on appeal was duly filed herein, in the words and figures following, towit: [96]

[Title of District Court and Cause.]

State of Montana
County of Powell—ss.

I, Dorothy Brennan, being duly sworn upon my oath say: I am a native born citizen of the United States over the age of eighteen years and I am a clerk and stenographer at the law office of S. P. Wilson at Deer Lodge, Montana. F. E. Dorety is the attorney for defendant, Great Northern Railway Company and he resides at St. Paul, Minnesota, and his post office address is c/o Legal Department, Great Northern Railway Company, St. Paul, Minnesota. J. E. Corette, Jr., is one of the attorneys for Raymond MacDonald, As Trustee of an Express Trust for Others, Intervener, and he resides at Butte, Montana, and his post office address is Electric Building, Butte, Montana.

Upon August 2nd, 1939, I served the designation of the portions of the record, proceedings, to be contained in the record on appeal of Star Pointer Exploration Company upon the attorneys foregoing named by mailing to each of them a true and correct copy of praecipe of Star Pointer Exploration Company to the Clerk of the above court for preparation of a transcript of the record on appeal and designating the portions of the record to be included in the record on appeal; said copies of praecipe were each securely enclosed in a [97] sealed envelope and said envelopes were addressed as follows:

Mr. F. E. Dorety
Legal Department
Great Northern Railway Co.
St. Paul, Minnesota

Mr. J. E. Corette, Jr.
Electric Building
Butte, Montana

and said envelopes each with postage prepaid thereon were by me deposited in the United States Post Office at Deer Lodge, Montana, on the date aforesaid.

DOROTHY BRENNAN

Subscribed and sworn to before me this 5th day of August, 1939.

[Notarial Seal] S. P. WILSON
Notary Public for the State of Montana,
Residing at Deer Lodge, Montana.

My Commission expires December 10, 1939.

[Endorsed]: Filed August 7th, 1939. [98]

CLERK'S *TRANSCRIPT* TO RECORD ON APPEAL

United States of America:
District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States

Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 99 pages, numbered consecutively from 1 to 99, inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case No. 32, United States vs. Great Northern Ry. Co., et al., as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-Eight and 25/100ths Dollars, ($28.25), and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 22nd day of August, A.D., 1939.

[Seal] C. R. GARLOW,
Clerk as aforesaid.

By MAX JENKS
Deputy. [99]

[Endorsed]: No. 9274. United States Circuit Court of Appeals for the Ninth Circuit. Star Pointer Exploration Company, Appellant, vs. United States of America, Great Northern Railway Company, a Corporation, and Raymond MacDonald, as Trustee of an Express Trust for Others, Appellees. Transcript of Record. Upon Appeal

from the District Court of the United States for the District of Montana.

Filed August 25, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9274

STAR POINTER EXPLORATION COMPANY
Appellant,

vs.

UNITED STATES OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, a corporation, RAYMOND J. MacDONALD as trustee of an express trust for others,
Respondents.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION AND TO BE PRINTED

Comes now the appellant and complying with Subd. 6 of Rule 19 of the Rules of the United States

Circuit Court of Appeals for the Ninth Circuit and makes statement of the points on which appellant intends to rely on the appeal, to-wit:

The question for determination is—in whom is vested title to minerals underlying a railroad right-of-way granted under Act of Congress of July 2, 1864, and/or March 3, 1875, through public lands of the United States and acts supplementary thereto and amendatory thereof. Appellant claims, (a), that appellant is the grantee of the patentees from the United States of America of fractional subdivisions of land traversed by right-of-way granted to Northern Pacific Railway Company under act of July 2, 1864, subject to the rights of the railway company and its successors in the right-of-way strip as the same is conferred and for the purposes granted under the Act of Congress; (b), that as grantee of patentees appellant has an interest in the question to be determined by the present litigation; (c), representation of appellant's interest by existing parties may be inadequate and appellant may be bound by an adverse judgment in the action, so that appellant may be adversely affected by the judgment in the case; (d), appellant's claim and the main action have questions of law as well as questions of fact in common; hence, and in order that appellant's rights may not, in appellant's absence, be adversely determined, the court in the exercise of discretion should have permitted appellant to intervene and participate in the litigation.

Under Subd. (a) of Rule 24 of Rules of Civil Procedure, appellant should be permitted to intervene as a matter of right; under Subd. (b) of the same rule, the Court, in the exercise of the Court's discretion, should have extended to appellant the right to intervene, such intervention not tending to unduly delay nor prejudice the adjudication of the rights of the original parties. By the decision, the Court denied to appellant the right to intervene, which ruling and decision was prejudicial to appellant and erroneous.

Appellant thinks that it is necessary for the consideration of the points on which appellant intends to rely to have printed the entire record as certified by the Clerk of the United States District Court for the District of Montana to the Clerk of the above Court and appellant desires that such entire record be printed in order that the points upon which appellant intends to rely may be given consideration and appellant respectfully requests the printing of such entire record as the Transcript of Record upon Appeal.

Dated this 29th day of August, 1939.

EDWARD J. BLOOM
Wallace, Idaho
S. P. WILSON
Deer Lodge, Montana
Attorneys for Appellant

State of Montana
County of Powell—ss.

I, Dorothy Brennan, being duly sworn upon my oath say: I am a native born citizen of the United States over the age of eighteen years and I am a clerk and stenographer in the law office of S. P. Wilson at Deer Lodge, Montana. Upon August 29, 1939, I served the foregoing Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Parts of Record Necessary for Consideration and to be Printed in the above entitled action upon the following attorneys for respondents above named, to-wit:

John B. Tansil
United States Attorney
Billings, Montana

F. G. Dorety
Law Department
Great Northern Railway Company
St. Paul, Minnesota

W. H. Hoover, L. V. Ketter
and John E. Corrette
Attorneys at Law
Butte, Montana

That such service was made by mailing to each of the attorneys aforesaid a true and correct copy of said Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Parts

of Record Necessary for Consideration and to be Printed. Each copy so mailed was securely enclosed in a sealed envelope and said envelopes were addressed to the attorneys above named at their addresses as above stated, respectively, and each of said envelopes so enclosed and with postage thereon prepaid was by me deposited in the United States Post Office at Deer Lodge, Montana upon the date aforesaid.

DOROTHY BRENNAN

Subscribed and sworn to before me this twenty-ninth day of August, 1939.

[Seal] S. P. WILSON
Notary Public for the State of Montana,
Residing at Deer Lodge, Montana

My Commission expires December 10, 1939.

[Endorsed]: Filed Sept. 1, 1939.

No. 9274

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STAR POINTER EXPLORATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, GREAT NORTHERN RAILWAY COMPANY (a corporation), and RAYMOND MACDONALD, as trustee of an express trust for others,
Appellees.

OPENING BRIEF FOR APPELLANT, STAR POINTER EXPLORATION COMPANY.

S. P. WILSON,
Deer Lodge, Montana,
EDWARD J. BLOOM,
Wallace, Idaho and Hobart Building, San Francisco, California,
Attorneys for Appellant,
Star Pointer Exploration Company.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

OUTLINE OF BRIEF OF APPELLANT IN SUPPORT OF RIGHT TO INTERVENE IN CASE WHERE TITLE TO MINERALS IN LAND OWNED BY APPELLANT IS CLAIMED BY BOTH GOVERNMENT AND RAILROAD, APPELLEES HEREIN.

Page

Memorandum Identifying Parties to Action 1

Statement of the Order Appealed From 2

Jurisdictional Statement 2

Statement of Pleadings and Question Involved 4

Statutes affecting the issues 9

Under wording of the Act of March 3, 1875, and related Federal Statutes and Land Office Regulations the right to mine or drill for oil by either the Government or the railroad on rights-of-way held in limited fee cannot be upheld under provision for disposal of lands crossed by right-of-way (43 U. S. C. A. 937) 9

Wording of Grant of March 3, 1875 9

Right-of-way granted defined as easement by Congressional Act 13

Fee underlying easement patented to appellant 15

Factual basis for intervention rests in Government's own act extinguishing its title and granting fee to appellant "subject" to right-of-way 15

Intervention indispensable to preservation of appellant's fee 18

"Subject matter of action" is entire right-of-way from St. Paul to Tacoma or Act of March 3, 1875, or both 20

New policy of intervention under New Civil Procedure Rules 23

Case is first requiring Circuit Court to pass directly on Rule 24 of New Civil Procedure Rules 19

Appellant is real party in interest and necessary party to litigation 26

Liberal interpretation of Rule 24 required 34

United States Supreme Court decisions unanimously and repeatedly hold railway's estate in right-of-way to be

Page

limited fee, but do not state what that is. Appellant entitled to reversion on termination of "limited fee", and to reserved rights now 37

Montana state decisions construing railroad right-of-way grants hold patentee may remove minerals 46

Petition in intervention seeks no affirmative relief against Government—merely dismissal of suit 47

Government's complaint is collateral. Attack on its patents barred by statute of limitations 47

Conclusion 48

Appendix on situation of appellee Raymond J. MacDonald ... i

Table of Authorities Cited

United States Supreme Court Cases	Pages
Choctaw etc. R. R. v. Mackay, 256 U. S. 531, 65 L. Ed. 1076, 41 S. Ct. 582	39
Clairmont v. United States, 225 U. S. 551, 56 L. Ed. 1201, 32 S. Ct. 787	39
D. & R. G. Ry. v. Alling, 99 U. S. 463, 475, 25 L. Ed. 438	39
Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356	iii
Great Northern Ry. v. Steinke, 261 U. S. 119, 67 L. Ed. 564, 43 S. Ct. 316	41
Hurn v. Oursler, 289 U. S. 238, 77 L. Ed. 619, 53 S. Ct. 586	20
New Mexico v. U. S. Trust Co., 172 U. S. 171, 43 L. Ed. 407, 19 S. Ct. 128	42
Noble v. Oklahoma City, 297 U. S. 481, 80 L. Ed. 816, 56 S. Ct. 562	39
Noble v. Union River Logging Co., 147 U. S. 165, 13 S. Ct. 271	41
Northern Pacific Ry. v. Ely, 197 U. S. 1, 5, 6, 49 L. Ed. 639, 25 S. Ct. 302	39
Northern Pacific Ry. v. Townsend, 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671	39, iii
Radford Iron Co. v. Appalachian Electric Power Co., cert. denied 289 U. S. 748, 77 L. Ed. 1494	3
Rio Grande Western R. R. v. Stringham, 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5	38, 42, 45
Smith v. Gale (1892), 144 U. S. 509, 36 L. Ed. 521	30
Stalker v. Oregon Short Line, 225 U. S. 142, 56 L. Ed. 1027, 32 S. Ct. 636	39
United States v. Michigan, 190 U. S. 379, 398, 47 L. Ed. 1103, 23 S. Ct. 742	39
United States v. California Co-op. Canneries, 279 U. S. 553, 556, 73 L. Ed. 828, 841	3
Western Union Tel. Co. v. Penn. R. R., 195 U. S. 540, 49 L. Ed. 312, 25 S. Ct. 133	40

Federal Cases

Pages

American Surety Co. v. Wheeling Steel Corp., 26 F. Supp. 395 35
Atlantic Refining Co. v. Point Lobos Petroleum Corp., 280 Fed. 934 37
Bickford's, Inc. v. Federal Reserve Bank, 5 F. Supp. 875... 30
Clymore Production Co. v. Thompson, 11 F. Supp. 791..... 33
Collins v. Metro-Goldwyn Pictures Corp. (adv. sheets), 106 Fed. (2d) 83, 86 ..... 19, 20, 25, 36
Coca-Cola Bottling Co. v. Coca-Cola, Inc., 269 Fed. 796..... 34
Dutcher v. Haines City Estates, 26 Fed. (2d) 669..... 31
Palmer v. Bankers Trust Co., 12 Fed. (2d) 747, 752..... 3
Radford Iron Co. v. Appalachian Electric Power Co., 62 Fed. (2d) 940..... 3
Richfield Oil Co. v. Western Machinery Co., 279 Fed. 852... 3, 32
Schmidt v. U. S., 102 Fed. (2d) 589..... 18
Sloan v. Appalachian Electric Power Co., 27 Fed. Supp. 108 35
State of Washington v. United States, 87 Fed. (2d) 421.... 3, 18
United States v. Certain Lands, 25 F. Supp. 52..... 35
United States v. Columbia Gas & Electric Corp., 27 F. Supp. 116 ..... 35, 37
United States v. 397 Cases of Salad Oil, 16 F. Supp. 387.... 32
United States v. C. M. Lane Life Boat Co., 25 F. Supp. 410 35
United States v. Ladley, 51 Fed. (2d) 756..... 34
United States Trust Co. v. Chicago Terminal Tr. R. Co., 188 Fed. 292 ..... 3, 31
Washburn Crosby Co. v. Nee, 13 F. Supp. 751..... 38
West v. East Coast Cedar Co., 101 Fed. 615..... 33
Whitaker v. Brictson Mfg. Co., 43 Fed. (2d) 485..... 3, 32

Decisions of the Department of the Interior

Regulations Under Act of March 3, 1875, Vol. XXXII, pp. 481, 482 12
Regulations Under Act of March 3, 1875, Vol. XII, pp. 423, 428 ..... 10, 11
Re Pensacola & Louisville Ry. Grant, Vol. XIX, p. 388..... 12

Federal Statutes

Pages

Act of July 2, 1864 (Northern Pacific Grant), 13 Stat. L. 365 ..... 5, 15, 38, 39
Act of July 27, 1866 (Atlantic and Pacific Grant), 14 Stat. 292 41
Act of June 8, 1872 (Pensacola Ry. Grant), 17 Stat. 340 .... 11, 12
Act of March 3, 1875 (Great Northern Ry. and General Grants), 18 Stat. L. 482, 483 ..... 4, 5, 6, 7, 9, 10, 12, 13, 15, 16, 21, 22, 23, 26, 38, 41, 42, 48
Act of March 3, 1891 (Statute of Limitations), 26 Stat. 1099 48
Act of June 26, 1906 (Right-of-Way Forfeiture Act), 34 Stat. 482 14
Act of February 25, 1909 (Subsequent Legislation), 35 Stat. 647 ..... 14, 45
Act of May 21, 1930 (Leasing Act), 46 Stat. 373 ..... 4, 22, 26, 45

28 U. S. C. 723, Rule 37 (Repealed) 23, 24, 25, 27, 30, 31, 32, 37
28 U. S. C. 723-c, Rule 24 ..... 6, 18, 19, 23, 24, 27, 29, 30, 32, 34, 35, 36, 37
28 U. S. C. 723-c, Rule 73-a, b, 75-g 2
28 U. S. C. 225, Sec. 128-a 2

State Statutes

Revised Codes of Montana, 1935, Section 9088 9

State Cases

Chambers v. A. T. & S. F. Ry. Co., 255 Pac. 1092, 1094, 32 N. M. 265 41

Dubuque v. Benson, 23 Iowa 248 46

Hollingsworth v. Des Moines Ry. Co., 63 Iowa 443, 19 N. W. 325 47

Jackson v. Hathaway, 15 Johns. 447 46

Lewis v. Rio Grande W. Ry. Co., 17 Utah 504, 54 Pac. 981 .. 42

Northern Pacific R. R. v. Forbis, 39 Pac. 571 46

Rio Grande v. Stringham, 38 Utah 113, 110 Pac. 868, 39 Utah 236, 115 Pac. 967 44

Pages
Seaboard Airline v. Board, 108 So. 689, 696, 91 Fla. 612.... 41
Smith v. Hall (1897), 103 Iowa 95, 72 N. W. 427..... 47

Tucker v. Eldred, 6 R. I. 404..... 46

West Covington v. Freking, 8 Bush. 121..... 46
Woodruff v. Neal, 28 Conn. 165..... 46

Texts

Edmunds, Federal Rules of Civil Procedure (1938), Vol. 2.. 33

Pomeroy on Code Pleading, 4th Edition.....25, 27

Schweppe's Simkins Federal Practice, 3rd Edition..... 2, 37

Law Journals

George W. Moore on Intervention, 25 Georgetown L. Jour. 551, 570 28

Federal Intervention, 45 Yale Law Jour. 565, 573.....28, 29

Intervention in Federal Equity Cases, 17 A. B. A. Jour. 160, 161 30

Spaeth, 30 Ill. Law Rev. 137, 149..... 33

English Intervention Rules and Cases

In Re Fowler, 142 L. T. J. 94.....29, 30

Judicature Act, the Annual Practise, 1937, O. 12, R. 24, R. 25, R. 23, O. 57, R. 12, O. 16, R. 11..... 29
Judicature Act, 1925, pp. 181, 182, 183..... 29

In Re Metropolitan Amalgamated Estates, Ltd., 2 Ch. 497.. 29

Vavasseur v. Krupp, 9 Ch. D. 351..... 29

Wilson v. Church, 9 Ch. D. 552..... 29

No. 9274

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STAR POINTER EXPLORATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, GREAT NORTHERN RAILWAY COMPANY (a corporation), and RAYMOND MACDONALD, as trustee of an express trust for others,
Appellees.

OPENING BRIEF FOR APPELLANT, STAR POINTER EXPLORATION COMPANY.

PARTIES.

Appellee, the United States of America, plaintiff below, is hereinafter referred to as "plaintiff", and appellee Great Northern Railway Company, defendant below, is hereinafter referred to as either "defendant" or as the "Railroad". Appellant is referred to as "appellant" or as "applicant for intervention".

The position of appellee Raymond J. MacDonald, as trustee, etc., is explained fully in the appendix following page 50.

JURISDICTIONAL STATEMENT.

This is a suit, brought by the United States against the Great Northern Railway Company to enjoin the railway company from taking minerals from beneath the surface of its right-of-way. (R. 2.) Appellant filed a petition for leave to intervene (R. 13), which was denied. (R. 26.) This appeal is from the order denying appellant's petition for leave to intervene.

The Court below had jurisdiction under Revised Statutes, Sections 563 and 629, as amended. (28 U. S. C. 41.) (R. 3, par. 2.) Appellant, a corporation of the State of Nevada, sought intervention of right under Rule 24 of the Federal Rules of Civil Procedure. The amount in controversy was in excess of $3000. The United States was a party, and as between defendant and appellee Great Northern Railway Company, appellee Raymond J. MacDonald, and appellant and intervener, a diversity of citizenship existed. However, the rule of jurisdiction in Federal Courts, depending on citizenship and amount or value of the subject matter, is generally held not to apply to interventions.

Schweppe's Simkins Federal Practise, ¶434, pages 370, 371.

This Court has jurisdiction under Section 128(a) of the Judicial Code. (28 U. S. C. 225.)

Appropriate notice of appeal was duly given, and filed in this Court in a timely manner. (R. 76.) By the order denying intervention, there has been a practical denial of certain relief to which the appellant is clearly entitled, since it cannot otherwise protect its right, being forbidden to sue the United States in a

direct action for the purpose of settling the one question raised both by the attempted intervention and by the main case.

Palmer v. Bankers Trust Co. (C. C. A. 8th), 12 Fed. (2d) 747, 752;

Radford Iron Co. v. Appalachian Electric Power Co. (C. C. A. 4th), 62 Fed. (2d) 940, cert. denied 289 U. S. 748, 77 L. Ed. 1494;

U. S. v. Calif. Coop. Canneries, 279 U. S. 553, 556, 73 L. Ed. 828, 841;

U. S. Trust Co. v. Chicago Term. Tr. R. Co. (C. C. A. 7th, 1911), 188 F. 292.

An order denying intervention is final and appealable if intervener is thereby prevented from obtaining relief.

State of Wn. v. U. S. (C. C. A. 9th), 87 Fed. (2d) 421.

Discretion to deny leave to intervene is a sound discretion, founded on the assumption that there are other available remedies open to the petitioner, and it is error to deny the right in a proper case where the intervener has no other recourse.

Richfield Oil Co. v. Western Machinery Co. (C. C. A. 9th, 1922), 279 Fed. 852.

Intervention may be a matter of right where petitioner, not being fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form.

Whitaker v. Brictson Mfg. Co. (C. C. A. 8th, 1930), 43 F. (2d) 485.

STATEMENT OF THE CASE.

In its complaint the United States alleges that under the Act of March 3, 1875, granting a right-of-way through the public lands of the United States to the predecessor of the Great Northern Railway Company, that said company acquired neither the right to use any portion of said right-of-way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the mineral deposits underlying the said right-of-way, but that such minerals remained the property of the United States and subject to its control and disposition, and that the defendant Railway Company claims and asserts ownership to the oils and minerals underlying its right-of-way and, unless restrained, will drill for and remove minerals underlying the surface of the right-of-way, depriving the United States of its property and the right thereto, to its irreparable injury. And, further, that the United States has the right to dispose of the mineral oil underlying said right-of-way under the Act of May 21, 1930. (46 Stat. 373.) The defendant Railway Company admits that unless it is restrained, it will drill for and remove the mineral oil underlying the surface of its right-of-way; denies that any part thereof is the property of the United States; and alleges that the minerals are its own property.

Appellant's claim hereinafter stated is adverse to plaintiff and adverse to defendant as to the minerals only, but relates to the subject thereof, to-wit: The title to minerals underlying a railroad right-of-way

granted under the Act of Congress of March 3, 1875, and similar acts.

Appellant is the owner in fee of certain sections of land in Granite County, Montana, by virtue of a series of patents from the United States to its predecessors in interest. All such sections are traversed by and are subject to the right-of-way of the Northern Pacific Railway Company. Said right-of-way was granted through the public lands by the United States to Northern Pacific Railway Company, under the Act of July 2, 1864, an Act, so far as here concerned, virtually identical in terms with the Act of March 3, 1875. The patents to appellant's predecessors reserved neither the right-of-way previously granted to the Railroad Company nor the minerals underlying the right-of-way, nor any minerals whatsoever; and as to minerals in lands so patented, appellant alleges that neither the plaintiff nor the defendant, appellees herein, have any right but that said rights belong entirely to the patentee and its successors in interest, represented as a class by appellant.

The plaintiff and defendant each claim title to the minerals underlying the right-of-way granted by the Act of March 3, 1875. Appellant avers that neither plaintiff nor defendant is or can be the owner of such underlying minerals because such minerals are owned by the patentees and grantees from the plaintiff of fractional subdivisions of land traversed by the railroad right-of-way, such ownership being subject, nevertheless, to the rights of the Railroad Company in the right-of-way strip as the same are conferred, and

for the purposes granted, under the Acts of Congress mentioned in the complaint and petition for leave to intervene.

Appellant sought to show by intervention that the United States extinguished its interest by the issue of patents and hence had no further interest. Intervention was sought under Rule 24 of the Federal Rules of Civil Procedure. This rule is hereinafter set out.

The title of the United States to the minerals underlying the right-of-way, if not extinguished by the grant to the Railroad under the Act of March 3, 1875, was extinguished by the subsequent act of the United States in patenting the land traversed by the right-of-way to the appellant's predecessors in interest, and the present right of possession to said minerals in appellant is superior to the rights asserted in the main suit by either plaintiff or defendant. If this is so, the United States, having no legal interest, cannot maintain a suit for an injunction and its complaint should be dismissed. Appellant believes that denial of intervention amounts to denial of relief to which it is entitled, in that, not being fairly represented below either by the plaintiff or defendant, its rights might be lost or substantially affected if intervention is not allowed.

In principle and in fact, title to minerals estimated to exceed in value the sum of $4,000,000 and belonging to appellant and underlying the right-of-way of the Northern Pacific Railway Company will be determined by the judicial construction of the Act of March 3,

1875, the same being the subject matter of consideration by the District Court.

Appellant, the successor in interest of such patentees and grantees of the plaintiff, alleged below that any attempted representation of its interest by plaintiff would be inadequate, and that in fact plaintiff's interest is adverse to appellant, and that no representation of appellant's interest would be made by plaintiff, nor would plaintiff present appellant's claim or legal rights to the consideration of the Court, either in whole or in part or at all, and that appellant would or may be bound by the judgment, to its irreparable injury.

Appellant alleges below that the question of law is whether, under the Railroad Land Grant Right-of-Way Act of March 3, 1875, and acts supplementary thereto and amendatory thereof, title to the minerals underlying rights-of-way so granted are vested in:

1. The United States, plaintiff herein, or
2. The Railway Company, defendant herein, or
3. The patentee of the subdivision traversed by the right-of-way.

Appellant, applicant for intervention below, contended that the question ought not to be determined by a consideration only of the asserted rights of plaintiff and defendant, that is, whether the title is vested in the United States or the Railway Company, but should be extended to that class of property owners in the situation of appellant; and appellant asserted

that such rights will not be stressed by either of the parties to the action, and that a full and complete judicial and equitable disposition of the pending case cannot be made without consideration of the rights of that class of ownership represented by appellant.

Appellant's interest in the litigation is substantial and its attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding. Further, no remedy other than the intervention proposed is available for protection of intervener's rights to minerals underlying said railway right-of-way for the reason that the plaintiff claims said minerals, and appellant is without statutory authority to litigate or quiet its title against plaintiff in an independent suit brought for that purpose.

Appellant believes that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties to this action, and so asserted below.

In the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3, 1875, defendant, the Great Northern Railway Company, interposed no objection to appellant's petition in intervention in the Court below.

STATUTES AFFECTING THE ISSUES.

Under wording of the Act of March 3, 1875, and related Federal Statutes and Land Office Regulations the right to mine or drill for oil by either the Government or the railroad on rights-of-way held in limited fee cannot be upheld under provision for disposal of lands crossed by right-of-way. (43 U. S. C. A. 937.)

Intervention in State Practice in Montana.

Revised Codes of Montana, Section 9088, provide:

> "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. * * * (1921).

Such parts of the Act of March 3, 1875, as are pertinent here, are as follows, reference being made to Title 43 U. S. C. A. and the appropriate section numbers thereof.

> 934. RIGHT OF WAY THROUGH PUBLIC LANDS GRANTED TO RAILROADS. The right-of-way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said roadroad; also ground adjacent to such right-of-way for station buildings, depots, machine shops,

side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. (March 3, 1875, c. 152, ¶1, 18 Stat. 482.)"

937. FILING PROFILE OF ROAD: FORFEITURE OF RIGHT. Any railroad company desiring to secure the benefits of sections 934 to 939, inclusive, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, *and thereafter all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way;** Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. (March 3, 1875, c. 152, ¶4, 18 Stat. 483.)

The railroad company filed its profile of its road across Glacier County in 1891. At that time the rules and regulations of the Department of the Interior, promulgated January 13, 1888, were in effect. These rules and regulations concerned the Act of March 3, 1875, and prescribed the proceedings to be taken in order for a railroad to obtain a right-of-way thereunder. These rules and regulations state as follows, at page 428:

*Italics throughout the brief are supplied unless otherwise indicated.

"The Act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right-of-way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States."

"* * * All persons settling on public lands to which a railroad right-of-way has attached, take the same subject to such right-of-way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."

Vol. XII, Decisions of the Department of Interior.

The Department of the Interior, as will be seen from the above-quoted part of its regulations, was of the opinion that the right-of-way was a right to *use* the 200-foot strip of land and not the entire corpus of the land embraced within the 200 feet of right-of-way, and that settlers on the public lands to which the right-of-way attached, took those lands subject to the right-of-way, and that they were required to pay for the full area of the subdivision entered, including the area within the right-of-way.

In 1894 the Secretary, in a letter to the Commissioner of the General Land Office, dated November 30th, held that the special Act of June 8, 1872 (17 Stat. 340), granted to the Pensacola and Louisville Railroad Company of Alabama only an easement to the company. The grant of right-of-way under that Act is in the same words as the grant in the Act of

1875 and other railroad grants. The Commissioner said (page 388):

> "The language of the Act of June 8, 1872, is: 'that the right-of-way through the public lands be, and the same is hereby, granted', etc. It is not the fee but the right to use the public lands for railroad purposes which was granted, and, in my opinion, an easement only was intended to pass to the railroad company."
>
> Vol. XIX, Decisions of the Department of Interior.

On January 6, 1904, the Commissioner of the General Land Office promulgated new regulations concerning the Act of 1875, which were approved February 11, 1904, by Secretary Hitchcock. These regulations stated (pages 482-483):

> "The Act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by law, a reversionary interest remaining in the United States, *to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the rights-of-way.* All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases."
>
> Vol. XXXII, Decisions of the Department of Interior.

Taking the above statement of the Secretary by its four corners, it is apparent that he was of the opinion that the entire corpus of the land did not pass to the railroad company; that there was granted to the company the exclusive right of possession of the land, and the right to use it, for the purposes contemplated by the law, that is, for a railroad right-of-way, and that whatever reserved rights existed were conveyed by the Government to the person to whom the land over which the right-of-way passed was conveyed by such conveyance or patent and that when the surface was no longer used for the purpose for which it was granted, it, too, would revert to the patentee. This he no doubt deemed to be the meaning of the provision in the Act of 1875, that "all lands over which the right-of-way shall pass are to be disposed of subject to the right-of-way."

The Right of Way Is Called an Easement by Congressional Act.

Congress, in Section 940 of Title 43, U. S. C., relating to the forfeiture of rights where a railroad was not constructed within five years after location, refers to the right-of-way as an easement, and to its conveyance to the patentee of the Government. The section reads as follows:

> "940. Forfeiture of Rights Where Railroad Not Constructed in Five Years After Location. Each and every grant of right-of-way and station grounds made prior to February 25, 1909, to any railroad corporation under the six preceding sections, where such railroad had not been constructed and the period of five years next following the location of said road, or any sec-

> tion thereof, had on that date expired, is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such *easement,* and the forfeiture declared shall, without need of further assurance or conveyance, *inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right-of-way or station grounds;* Provided, that no right-of-way on which construction was progressing in good faith on February 25, 1909, shall be in any wise affected, validated, or invalidated, by the provisions of this section. (June 26, 1906, c. 3550, 34 Stat. 482; Feb. 25, 1909, c. 191, 35 Stat. 647.)"

The sense of this statute is in conformity with the idea of the Land Department in its regulations, quoted above, that the whole corpus of the land did not pass to the railroad company but that the railroad took what the statute calls an easement.

While the complaint asserts that the United States owns the oil, gas, and other minerals under the right-of-way, we respectfully call the attention of the Court to the fact that there is no allegation in the complaint that the United States has not disposed of the lands over which the right-of-way passes. The allegation is that they were public lands at the time the right-of-way was granted and that the defendant is now operating and maintaining a railroad on the right-of-way "over public lands" granted to defendant's predecessor.

FEE UNDERLYING EASEMENT PATENTED TO APPELLANT.

Factual Basis For Intervention Rests in Government's Own Act Extinguishing Its Title and Granting Fee to Appellant "Subject" to Right-of-Way.

The question presented by the complaint and the answer is whether, under the Railroad Right-of-Way Act of March 3, 1875, title to the minerals underlying rights-of-way granted by the Act are vested in:

1. The United States, plaintiff herein, or
2. The Railway Company, defendant herein.

Intervention is sought because appellant believes it would be irreparably injured by determination of the issue without a consideration of its ownership rights, as the successor to the patentees of the United States, to various legal subdivisions of land traversed by a railroad right-of-way granted under the Act of Congress of July 2, 1864, in terms virtually identical with the language of the Act of March 3, 1875. By consideration of such rights, the rights of all land owners similarly situated who derive their title to lands traversed by railroad rights-of-way by patent from the United States would be determined. Such patents to lands traversed by such rights-of-way almost uniformly grant the legal subdivision, without specific reservation of the right-of-way. The granting Act specifically provided that any railway company desiring to secure the benefits of the Act was required to file with the Register of the Land Office for the District in which the land was located, a profile of its road, and that "thereafter all such lands over which such right-of-way shall pass shall be disposed of sub-

ject to such right-of-way * * *'' Section 937, Title 43, U. S. C. A.

After the Government has disposed of any of the lands over which the right-of-way passes (and the public records disclose that it has), it is obvious that, under the provisions of this statute, it is a matter of grave doubt, if the minerals under the right-of-way did not pass to the railroad company, whether they belong to the Government, as contended, since the Government has disposed of the lands over which the right-of-way passes, subject only to the right-of-way.

The present case involves the question of ownership of the minerals underlying the railroad right-of-way as between the railway company and the United States, but this question is presented solely upon the theory that the United States had not disposed of the mineral rights underlying the right-of-way when it patented into private ownership the remainder of the legal subdivision crossed by the right-of-way. Trial of the case on this theory we believe would be so manifestly unfair to appellant as to be repugnant to equity, for the reason that appellant cannot sue the United States to determine the issue in a separate suit, and thereby the United States has the opportunity to obtain by injunction, what is the equivalent in legal effect of a declaratory judgment that it is the owner of the minerals underlying such railroad right-of-way without giving appellant, and the class of patentees represented by appellant, an opportunity to be heard. Such a judgment would constitute a precedent difficult to overcome and would render ap-

pellant liable to an accounting suit by the United States should it take the minerals it believes it owns from beneath the right-of-way, even though such taking was with the consent of the railroad and without any forbidden alienation, since the right-of-way would always remain available for railway use.

Since the prayer of the complaint is for restraint, is it not necessary for the trial Court to first determine whether the plaintiff has any right, even though the plaintiff be the United States? Can it do so without first hearing the patentee, whether he be the appellant or some other, since appellant's petition in intervention alleged affirmatively that the title of the United States to the minerals underlying the right-of-way was extinguished either by the grant to the railroad under the right-of-way granting Acts, or by the subsequent Act of the United States in patenting the land to private ownership? (R. 19, par. X.) If intervention is granted, the rights of the United States will not be protected at the expense of its grantees. The United States is claiming such minerals without any show of right, we believe, full well knowing and realizing that it has conveyed away such minerals, and that appellant, and those similarly situated, cannot later bring a suit against the Government to remedy what is believed to be an attempted taking of private property without a hearing. The United States, having opened up the question which even the railroad could not, the patentees, as a matter of justice and of right under the Rules of Civil Procedure, ought to be heard before the case is concluded.

Intervention Indispensable to Preservation of Appellant's Fee.

Intervention is indispensable to the preservation and enforcement of the claim of appellant, and appellant's interest in the minerals underlying the right-of-way can be established in no other way than by the determination and action of the lower Court, because, as has been said, independent suit by appellant against the United States cannot be maintained, and the United States has asserted ownership of minerals underlying the right-of-way on appellant's property. Thus the refusal to permit intervention is the denial to appellant of all relief, and such denial, not any longer being discretionary under Rule 24, may be appealed from. The United States has not granted the appellant a right to sue, either in the case appealed from, or in an independent action, but by the affirmative action of the United States in bringing the suit in Montana has given the appellant the opportunity to contest the claims of the Government which amount to complete seizures of appellant's mineral rights underlying the right-of-way. The denial of the right to intervene in such a case is appealable. (*Schmidt v. U. S.*, 102 F. (2d) 589; *State of Washington v. U. S.*, 87 F. (2d) 421.)

While the Court may consider the foregoing well taken, the Court will ask just what is the interest in this controversy of this intervener—that is—of appellant. This interest exists because the pleadings do not confine the issue to specific sections of right-of-way in Glacier County, Montana, but they present largely a question of law as to the rights of any of

the parties under any of the railroad or land grant right-of-way Acts as to any railway anywhere in the United States.

Were this not so, then the question might have to be presented in separate actions as to every legal subdivision of land traversed by any railroad right-of-way of any railroad in the nation.

The purpose of class suits by intervention proceedings is to prevent such a multiplicity of suits.

This Is the First Case Requiring Circuit Court to Pass Directly on Rule 24, New Civil Procedure Rules.

Apparently this is the first time that a Circuit Court has been asked to pass specifically on the meaning of Section 24 of the New Federal Rules of Civil Procedure.

Much of great import was said as to the construction of Rule 24 in connection with a discussion of Rules 13, 14, 18 and 20 in *Collins v. Metro-Goldwyn Pictures Corp.,* C. C. A., 2nd Circuit, 106 F. (2d) 83, 86, where the Court said:

> "The new rules provide for the presentation of numerous claims and the participation of multiple parties in a single civil action. Rules 13, 14, 18, 20 and 24 * * *"

Judge Clark concurring * * *

> "I desire, out of abundant caution, to stress a point perhaps made sufficiently clear in the opinion * * * that decisions as to the extent of a 'claim' or a 'cause of action' or a 'transaction' must necessarily be directed to the facts in issue

in a particular case and cannot be safely generalized into rigid rules applicable to other factual situations * * * The attempt to formulate and follow such rigid rules in the past has been generally unsuccessful, as well as prejudicial to the development of effective court procedure and at times unfair to litigants. One of the hopes for the new Federal Rules of Civil Procedure has been that these difficulties may be in large measure avoided or at least lessened. The variable character of 'cause of action' has been pointed out in Hurn v. Oursler, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 619. Because of its illusive character, that concept has been entirely omitted from the new Rules * * * These Rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Such lay view of a transaction or occurrence, *the subject matter of a claim,* is not a precise concept; its outer limits should depend to a considerable extent upon the purpose for which the concept is being immediately used."

Collins v. Metro-Goldwyn Pictures Corp., 2nd C. C. A., 106 F. (2d) 83, 86.

The Subject Matter of the Action Is the Entire Right-of-Way from St. Paul to Tacoma.

An examination of the complaint shows that the Government's claim is not restricted to a particular section of the right-of-way in Glacier County, Montana, but that Federal ownership of minerals is asserted in the entire right-of-way from St. Paul to Tacoma, Washington. The paragraphs of the com-

plaint that show this to be a fact are here set out at length:

"That under the Act of March 3, 1875 (18 Stat. 482), the St. Paul, Minneapolis and Manitoba Railway Company, a railroad corporation, was granted a right-of-way through the public lands of the United States. That on the eleventh day of October, 1907, the St. Paul, Minneapolis and Manitoba Railway Company conveyed to the Great Northern Railway all its rights of property, including 'various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of a railroad, hereinbefore described', etc. That the said Great Northern Railway Company is now operating and maintaining a railroad on the right-of-way over public lands granted to the St. Paul, Minneapolis and Manitoba Railway Company under the Act of March 3, 1875."

"That under the Act of March 3, 1875, the St. Paul, Minneapolis and Manitoba Railway Company or its successor, the Great Northern Railway Company, acquired neither the right to use any portion of said right-of-way for the purpose if drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the oil or mineral deposits underlying the said right-of-way, but that such oil and minerals remained the property of the United States, and subject to its control and disposition."

"That the defendant, the Great Northern Railway Company, claims and asserts ownership to the oils and minerals underlying its right-of-way as aforesaid and the right to take and remove the same and is about to and has threatened to use

portions of the right-of-way, crossing the lands hereinbefore described, for the purpose of drilling for and removing subsurface oil."

"That unless the said Great Northern Railway Company, the defendant, be restrained and enjoined from drilling for and removing oil underlying the surface of the right-of-way hereinbefore described the United States will be deprived of its property and the right thereto and will suffer irreparable injury."

"That any operation or proceeding for, or the taking of any oil, gas, or minerals from the subsurface of the right-of-way hereinbefore described constitutes a violation of the terms and provisions of the said Act of March 3, 1875."

"That no lease has been issued to the defendant, the Great Northern Railway Company under the Act of May 21, 1930 (46 Stat. 373), to drill upon or remove deposits of oil and gas under the said right-of-way of the defendant, nor has any application therefor been made."

"Wherefore, the plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any manner using the right-of-way granted, as hereinbefore described, for the purpose of drilling for and removing oil, gas and minerals underlying its right-of-way except under a lease issued pursuant to the provisions of the said Act of May 21, 1930, and that a permanent injunction issue, restraining the defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right-of-way, crossing the lands here-

> inbefore described, *or any other lands granted under the Act of March 3, 1875,* and now owned or used by the said defendant except under a lease issued pursuant to the provisions of the said Act of May 21, 1930."

Only incidentally does the complaint set out that

> "a portion of the said right-of-way, so granted and now in use by the Great Northern Railway Company * * *"

crosses certain described sections of land in Glacier County, Montana. (R. 4, par. IV.) Thus appellant submits that the subject matter of the action is both the Act of March 3, 1875 and the entire right-of-way granted under the Act of March 3, 1875, and not merely an isolated section of land, so that appellant, not owning that particular section, is not barred from setting up its ownership of similar right-of-way in another county, within the territorial jurisdiction of the Court below, and from asking intervention to protect its interest and present an identical question of law and fact.

New Policy in Intervention Under Rules of Civil Procedure.

Appellant believes that the new Federal Rules of Civil Procedure largely abandon the policy of the former Rules, at least so far as intervention is concerned.

Rule 24 of the New Rules had its basis in old Equity Rule 37. Setting them out together shows how different they are in form and concept.

Rule 37 was as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claim an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

"Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Rule 24, so far as pertinent here, reads:

Rule 24. Intervention.

A. Intervention of right. Upon timely application, anyone shall be permitted to intervene in an action. * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by a judgment in the action. * * *

> B. Permissive intervention. Upon timely application, anyone may be permitted to intervene. * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The changes effected by the new rule make inapplicable the authorities based on old Rule 37, in so far as the principles laid down in those cases are inconsistent with the provisions and concept of the new rule.

We respectfully urge that Rule 24 must be construed in the light of the intent of those who drafted it. This intent is expressed by the Circuit Court of Appeals for the Second Circuit in *Collins v. Metro-Goldwyn,* supra. It is also expressed in Pomeroy on Code Remedies (4th Ed.), par. 411, where the author, speaking of Rule 24, says:

> "It discards entirely the ancient notions; it goes far beyond the concessions made by the equity courts; it creates, under the title 'Intervention' or 'Intervening' a new division of the procedure. The fundamental notion is, that the person ultimately and really interested in the result of a litigation—the person who will be entitled to the final benefit of the recovery—may at any time, at any stage, intervene and be made a party, so that the whole possible controversy shall be ended in one action and by a single judgment. The states which have adopted this type to its fullest extent are Iowa and California, and their example has been followed in a number of others."

Appellant Is Real Party in Interest and Necessary Party to Litigation.

Now, who is ultimately and really interested in the result of this litigation? Obviously,

1. The Government, claiming ownership of the minerals underlying the entire right-of-way from St. Paul to Tacoma, and claiming, if it obtains a favorable construction of the Act of March 3, 1875, ownership of minerals underlying every other railroad right-of-way obtained under the Act of March 3, 1875, or other Acts in similar and identical language.

2. The Railroad, claiming the fee under the Act.

3. The Intervener, claimant to vast mineral wealth underlying the right-of-way, asserting merely that if the Railroad does not have the fee as has generally been assumed, then certainly the Government has no right to maintain the action, since the Government's right has been transferred by patent to Intervener, appellant herein, and others similarly situated.

We believe these three are essential parties to determination of this question. Only by hearing them all can the Court fairly decide if the Government is entitled to maintain the suit.

To examine again Pomeroy's statement, who "will be entitled to the final benefit of the recovery?" If the Railroad prevails, it will own the minerals; if the Government prevails, it will *claim* to own the minerals and will claim the right to lease the minerals under the Act of May 21, 1930 (46 Stat. 373), converting the

proceeds to its own use. The patentee would be excluded. Certainly the Federal Courts will not, by denying intervention, allow their process to be abused by this palpable attempt to deny a hearing to the grantee of the Government, resulting in the Government's profiting at the expense of its grantee, merely because of the flimsy and technical pretexts contained in the Government's answer set out on page 67, et seq., of the Transcript of Record.

Even if a right existed in appellant to sue the United States in a separate action (which of course does not exist) where, but in this case, is there a more suitable opportunity equitably to achieve the end that "the whole controversy shall be ended in one action and by a single judgment?" Pomeroy, par. 411, supra.

James W. Moore has pointed out that the portion of Equity Rule 37 providing that intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding" has been eliminated in Rule 24, and that the intervener is given the right to litigate the claim or defense for which he intervenes on the merits. He says in this connection:

> "The elimination seems sound, for if the Equity Rule was taken literally the grant of intervention to come in and defend an action, common in patent litigation, would be illusory, since the defendant seriously questions the propriety of the main action. What the phrase was designed to accomplish, it is believed, was to preclude intervenors from attacking the administrative orders already made and from obstructing or delaying

the progress of the main action." James W. Moore in 25 Georgetown L. Jour. 551, 570.

Appellant pleaded below that its intervention was in subordination to and in recognition of the main proceeding but, taking another view, intervener does "seriously question the propriety of the main action". It will be noted that for that reason no relief is asked against the United States. Intervener's petition merely seeks dismissal of the main action on the ground of plaintiff's lack of interest, as shown by the public records.

In "Federal Intervention: The Right to Intervene and Reorganization", 45 Yale L. Jour. 565, James W. Moore and Edward H. Levi say of Rule 24:

> "Together, the theories of joinder of parties and intervention offer a rational for determining what persons a plaintiff (and sometimes a defendant) may or must bring before a court in a particular action, the effect of a decision therein upon non-parties, and when non-parties may come into a pending litigation to protect interests that are jeopardized thereby or to expedite the hearing of a claim or defense. Intervention counterbalances the many devices of joinder. Its utility lies in offering protection to non-parties, who obviously comprise a large and undefined group with varied interests, oftentimes of tremendous financial and legal importance."

Certainly we do not believe that this Court will deny that a decision in favor of either the plaintiff or defendant below would not jeopardize the appellant's

right to mine the mineral wealth underlying its property. This being so, we submit, that appellant ought to be heard below.

Rule 24 was apparently prepared and enacted with the purpose of adopting the current English practice with respect to interventions, and of abandoning entirely the policy of old Rule 37. In its note to Rule 24 the Advisory Committee says:

> "The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) pp. 181, 182, 183 (2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.* (1912), 2 Ch. 497 (receivership); *Wilson v. Church,* 9 Ch. D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (non-joinder) and *Re Fowler,* 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur v. Krupp,* 9 Ch. d. 351 (1878) (persons out of the jurisdiction)."
>
> Pocket Supplement, Title 28 U. S. C. A. following 723c, pages 146, 147.

Discussing the modern intervention practice in England, Moore and Levi point out (45 Yale L. Jour. 565, 573) that it may be said to be an outgrowth of admiralty practice *in rem* and the examination *pro interesse suo;* and that although there is no express general rule, intervention is allowed as of right where the petitioner has or claims an interest in the subject

matter of an *in rem* proceeding; in class actions, where the petitioner is inadequately represented, as, for example, a dissentient minority bondholder; in execution proceedings where the petitioner is a claimant of the property levied upon; in divorce proceedings, where intervention is allowed to the King's Proctor, to a co-respondent, and to a qualified extent to any member of the public. The authors conclude: "And by judicial interpretation of the rule on non-joinder the court has discretion in allowing intervention to third parties (citing Re Fowler (1916), 142 L. T. J. 94). In effect it may be said that the absolute and discretionary right would seem to cover the entire field where intervention is warranted.

By adopting this English practice, the language of Rule 37, providing that "anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention" disappeared. The "interest in the litigation" under Rule 37 had to be a legal interest, as that term is judicially defined. Nowhere in new Rule 24 is any such barrier set in the way of an intervention. This would appear to supersede cases similar to *Bickford's, Inc. v. Federal Reserve Bank* (D. C. N. Y. 1933), 5 Fed. Supp. 875, holding the interest must be in the subject matter of the litigation and not an independent right similar to that asserted by a party to the litigation. Also no longer apparently approved, if we are correct, is *Smith v. Gale* (1892), 144 U. S. 509, 36 L. Ed. 521.

In "Intervention in Federal Equity Cases", 17 A. B. A. Jour. 160, 161, Benjamin Wham said:

> "The cases in which the right to intervene is absolute appear to have two characteristics in common: first, the intervener has no other remedy except by intervention and the decree of the Court will be res judicata as to his claim and, second, he has no adequate representation in court. It is thus apparent the dividing line is fixed at a point which will give him an opportunity to be heard either in the main proceeding in person or by representative, or in an individual suit."

Appellant believes that its right under its patents from the United States is superior to any claim asserted by the Government in the Court below, and superior to the claim of the defendant below, Great Northern Railway Company, as to the minerals only. It was held, in *Dutcher v. Haines City Estates* (C. C. A. 5th, 1928), 26 F. (2d) 669, that if intervener's title is alleged to be superior to any claim that may be asserted in the suit and independent thereof, that, even under old Rule 37, intervention should be allowed.

In former years (1911), it has been said that:

> Applications to intervene are of two kinds: In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incumber the main case with collateral inquiries; in the other, the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause, and in such case the right to intervene is absolute.
>
> *United States Trust Co. v. Chicago Terminal Transfer Railway Company,* supra.

Even under Rule 37, as late as 1936, it was said that:

> Generally, intervention is permitted in court's discretion where ends of justice will be served by permitting petitioner to be heard, and as absolute right where petitioner has direct interest in litigation and subject-matter thereof and such intervention is necessary for its protection. United States v. 397 Cases, etc., of Salad Oil (D. C. N. J. 1936), 16 F. Supp. 387.
>
> Discretion to deny leave to intervene is a sound discretion founded on the assumption that there are other available remedies open to the petitioner, and it is error to deny the right in a proper case where he has no other recourse. Richfield Oil Co. v. Western Machinery Co. (C. C. A. 9th, 1922), 279 Fed. 852.

It is of course asserted by appellant, and is a fact, that no other recourse is available to it. But this case is cited for the more important reason that it indicates that on this appeal this Court may consider not only whether appellant is entitled to intervene as of right, but also whether appellant is entitled to consideration under Section B of Rule 24, that is, whether or not the Court below exercised any discretion when it disregarded the point urged by intervener that it had no other remedy. (R. 19, pars. XI, XII.)

> Intervention may be a matter of right where petitioner, not being fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. Whittaker v. Brictson Mfg. Co. (C. C. A. 8th, 1930), 43 F. (2d) 485.

In an article by Spaeth and Friedberg, 30 Ill. L. Rev. 137, 149, it is stated:

> "It appears from the few decided cases under the new procedure that even when creditors and shareholders must petition for leave to intervene, the tendency is in the direction of freely allowing intervention."

See also

Edmunds Federal Rules of Civil Procedure, Volume 2, Rule 24.

As has been noted, the relief sought by the Government is injunctive. This constitutes all the more reason for permitting intervention. As stated by the Court in *Clymore Production Co. v. Thompson* (D. C. Tex. 1935), 11 F. Supp. 791:

> In a suit to restrain enforcement of a state commission's order restricting complainant's withdrawal or waste of natural gas from an underground pool, adjacent leaseholders who are also taking gas from the pool are held interested in preventing its depletion and may intervene.

There seems to be, to appellant's counsel, a striking parallel between the interests of all adjacent leaseholders interested in an oil and gas field, involved in the case just cited, and all patentees of the United States who own similar and other minerals underlying railroad rights-of-way. Similarly, somewhat parallel is the case of *West v. East Coast Cedar Co.* (C. C. A. 4th, 1900), 101 Fed. 615. There it was held that a part owner of a tract of land who is not made a party to a suit for its partition, but who claims as

a tenant in common with the parties, *and from the same source of title,* may properly be allowed to become a party by intervention, being in fact a necessary party to a decree for its partition. Counsel submit that there is a direct analogy between a suit for partition and the action here involved, which is, in effect, a suit for a partition of the types of fee which may exist in land burdened with a "limited fee" ownership of an easement in the surface in the form of a railroad right-of-way, and separate adjacent and subsurface estates. Further, a partition of the surface from the minerals involves the important question of whether different rules are applicable to the partition of metallic minerals, placer and alluvial deposits, and oil and gas.

Similarly, an injunction case in accord with those cited above is *Coco-Cola Bottling Co. v. Coca-Cola Co.* (D. C. Del. 1920), 269 Fed. 796.

Attention is also called to the parallel case of *United States v. Ladley* (D. C. Idaho, 1931), 51 Fed. (2d) 756, where the State of Idaho was permitted to intervene with claim of title in itself under grant from the United States, in a suit brought by the United States against Ladley to quiet title to land formerly under water.

LIBERAL INTERPRETATION OF RULE 24 REQUIRED.

In granting a motion to intervene in a suit brought by the United States against a private corporation, District Judge Galston said that Rule 24, "like all of

the Rules of Civil Procedure, should be liberally interpreted".

U. S. v. C. M. Lane Life-Boat Co. (D. C. N. Y., 1938), 25 F. Supp. 410.

Intervention has been permitted under Rule 24 in addition to cases heretofore cited, in *Sloan v. Appalachian Power Co.* (D. C. W. Va., 1939), 27 F. Supp. 108; in *American Surety Co. v. Wheeling Steel Co.* (D. C. W. Va., 1939), 26 F. Supp. 395; in *U. S. v. Certain Lands* (D. C. Ky., 1938), 25 F. Supp. 52.

The case of *United States v. Columbia Gas & Electric Corp.,* a Delaware District Court case (1939), 27 F. Supp. 116, is entitled to be included in what counsel is attempting to present as a fair summary of the applicable law in interventions under Rule 24. The opinion is by Judge Neilds and contains language sharply contrary to the contentions heretofore advanced by appellant. We think that we can explain the language used and the judge's views, in view of the facts in the case, but in fairness to the Court, we mention the case. While the Delaware District Court recognizes that under Rule 24 "the new rule does not specifically set forth the nature of the interest in the property which a person must have in order to establish his claim to intervention as a matter of right," he adds later, "it is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention of right." Granted that the Court did not intend to destroy well-established principles, the wording of the rule is susceptible of no other meaning

than that the Court did intend to broaden the scope of the rule. Further, the Court says:

> "It would produce chaos to require the Courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action."

With this sentence by itself appellant has no quarrel, but refers to the *Metro-Goldwyn* case from the 2nd Circuit Court of Appeals, supra, wherein it is said that under the new rule, the concept of just what is the subject matter of the action is broadened, and that because of the elusive character of a cause of action this concept "has been entirely omitted from the new rules".

Therefore, on the authority of the 2nd Circuit Court of Appeals, counsel can only say that when Judge Neilds dismisses the contention that Rule 24 has broadened these well-established principles with the statement that "this position is without authority to sustain it", he was in error. Otherwise, of course, in denying intervention, the Court was in line with the weight of authority in every respect, because the intervention was not timely, the issues sought to be raised were extraneous ones of a private nature, there was no "res" within the custody of the Court as claimed in the complaint, and there was an attempt to "outrageously enlarge the scope of the litigation", and the prayer was for relief sharply divergent from the scope of the complaint so that intervention would unduly complicate and delay the Government's anti-trust suit. Of course, the rule in any event is that an individual

may not participate in a suit brought by the United States to enforce the anti-trust laws, so that Judge Neild's remarks were largely dicta.

Therefore, it is confidently asserted that appellant's position is not adversely affected by the decision in *U. S. v. Columbia Gas & Electric Corp.,* supra.

United States Supreme Court Decisions Unanimously and Repeatedly Hold Railway's Estate in Right-of-Way To Be Limited Fee, but Do Not State What That Is.

Notwithstanding our belief, heretofore expressed, that decisions under Rule 37 must not be considered as controlling in construing New Rule 24, certain legal principles are inherent in intervention, by its very nature.

It is, therefore, proper in this brief to consider whether or not the appellant could ultimately prevail if intervention was granted.

In this connection, Schweppe's Simkins Federal Practise, ¶437, page 372, says:

> "* * * Apparently the well-pleaded averments of the application (for intervention) must be taken as true for the purpose of determining whether a sufficient interest has been alleged for intervention, and cannot be challenged at the hearing by denials, or evidence aliunde; in other words, seemingly, the only contest that can be waged against the application is with respect to its sufficiency upon its face, the merits of applicant's claim being for determination at the trial."

See also

Atlantic Refining Co. v. Port Lobos Petroleum Corp. (D. C.), 280 Fed. 934.

For this reason, intervention will be denied where petitioner could not ultimately prevail. (*Washburn Crosby Co. v. Nee,* 13 F. Supp. 751.) Enough of the problem presented by the main case is therefore set out to demonstrate some of the grounds upon which appellant places its belief that it could ultimately prevail below.

So far as defendant and appellee, Great Northern Railway, is concerned, it feels that the right granted it by the Act of March 3, 1875, was a limited fee and that view is sustained by numerous decisions of the United States Supreme Court.

> "What the Act relied upon grants to a railroad company complying with its requirements is spoken of throughout the Act as a 'right-of-way'; and by *way of qualifying future disposals of lands to which such a right has attached,* the act declares that 'all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way'."
>
> "The right-of-way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an *implied condition of reverter* in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."
>
> *Rio Grande Western R. Co. v. Stringham,* 239 U. S. 44, 47, 60 L. Ed. 136, 36 S. Ct. 5.

> "Following decisions of this court construing grants of right-of-way similar in tenor to the grant now being considered (July 2, 1864) it

must be held that the fee passed by the grant made in Section 2 of the Act of July 2, 1864 * * * subject to conditions expressly stated in the act and to those also necessarily implied such as the road should be * * * used for the purposes designed. * * * The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right-of-way. In effect the grant was a limited fee, *made on an implied condition of reverter* in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Northern Pacific Railway v. Townsend, 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671.

Other decisions to the same effect are:

United States v. Michigan, 190 U. S. 379, 398, 47 L. Ed. 1103, 23 S. Ct. 742;

Northern Pacific Ry. Co. v. Ely, 197 U. S. 1, 5-6, 49 L. Ed. 639, 25 S. Ct. 302;

Choctaw, etc., R. R. Co. v. Mackey, 256 U. S. 531, 65 L. Ed. 1076, 41 S. Ct. 582;

Noble v. Oklahoma City, 297 U. S. 481, 80 L. Ed. 816, 56 S. Ct. 562;

Stalker v. Oregon Short Line, 225 U. S. 142, 56 L. Ed. 1027, 32 S. Ct. 636;

Clairmont v. U. S., 225 U. S. 551, 56 L. Ed. 1201, 32 S. Ct. 787.

There is an early case of *D. & R. G. Ry. v. Alling,* 99 U. S. 463, 475 (1878), 25 L. Ed. 438, holding that the

railway acquired "a present beneficial easement in the particular way over which the designated route lay".

But that identification of the estate as a limited fee is of no aid in determining what a limited fee is with respect to whether or not the minerals are vested in either the grantor or the grantee—that is, in the United States or the Railroad. In other words the question is not so much what will revert on eventual abandonment, but what was reserved by the grant itself, and what is the present status of the reserved property rights. Most of the Courts say that under the Act of 1875 the railroads took "A fee in the surface and so much beneath as may be necessary for support".

Western Union Telegraph Co. v. Penn. R. R., 195 U. S. 540, 570, 49 L. Ed. 312.

By the use of the word "limited" before the word "fee", it would seem that the Courts had placed some sort of a limitation on the "fee" granted by the Act. Taking the Courts' idea that the railroad has only a "fee in the surface", that would leave title to the minerals and whatever else is reserved by that limitation, vested somewhere. Where? The Government claims that the minerals are vested in it by virtue of some vaguely expressed reservations contained in congressional debates. And the appellant claims that the Government's suit should be dismissed because the Government's interest has been conveyed to the Government's patentees. Certainly there is as much right to be heard in the patentee's claim that the Government has conveyed away its interest as there is in the

Government's claim that minerals did not pass to the railroad by the granting act.

The railroad claims with some merit that its grant under the Act of March 3, 1875, was equivalent to a patent.

In *Great Northern Railway Co. v. Steinke,* 261 U. S. 119, 125, 67 L. Ed. 564, 43 S. Ct. 316, it is said:

> "There is no provision in the act" of March 3, 1875, "for the issue of a patent, but this does not detract from the efficacy of the grant. The approved map is intended to be the equivalent of a patent defining the grant conformably to the intendment of the act. Noble v. Union River Logging R. R. Co., 147 U. S. 165."

In *Chambers v. A. T. & S. F. Ry. Co.,* 255 Pac. 1092 at 1094, 32 N. M. 265, it is said:

> "This grant" of the right-of-way under the Act of July 27, 1866 "had the same effect as a patent; hence the fact that one was not issued to the Atlantic & Pacific Railroad Company by the government is immaterial. 'The approved map', said the court in Great Northern Ry. Co. v. Steinke, 261 U. S. 119, 43 S. Ct. 316, 67 L. Ed. 564, 'is intended to be the equivalent of a patent defining the grant conformably to the intendment of the act.'"

See also

Seaboard Airline Ry. Co. v. Board, 108 So. 689, 696, 91 Fla. 612.

> The statute creating the grant was as much a part of the patent as though it had been written therein.
>
> *Lewis v. Rio Grande W. Ry. Co.,* 17 Utah 504, 54 Pac. 981.

Now the statute creating the grant has a section in it, heretofore cited, that says that when the right-of-way becomes fixed, "thereafter all such lands over which such right-of-way shall pass shall be disposed of, subject to such right-of-way". (43 U. S. C. A. 937.)

If the preceding arguments of the Supreme Court are sound, it seems to counsel that the above section of the Act of March 3, 1875, is as much a part of the railroad's "patent" as though it had been written therein; that it accepted the lands over which its right-of-way shall pass subject to such right of disposal.

Where, and how, does this reserve any title in the Government? We believe none exists. The question then arises as to what is the nature of the railroad's interest in the "right-of-way" granted by Congress.

> "The interest granted by the statute * * * is real estate of corporeal quality, and the principles of such apply."
>
> *New Mexico v. U. S. Trust Co.,* 172 U. S. 171, 43 L. Ed. 407, 19 Sup. Ct. 128.

The Court did not say that the entire corpus of the land within the right-of-way was granted to the railway, for it was not. And we believe the case of *Rio Grande Western Ry. Co. v. Stringham,* supra, author-

ity for the proposition that a railroad right-of-way is a separate surface ownership, and a mining title can exist in the same ground.

This was a case involving a railroad right-of-way under the Act of March 3, 1875. The defendants asserted title under a patent for a placer mining claim. Stringham owned the surface by conveyance from the patentee of the claim. The railway company brought an action to quiet title to the strip of land granted to it as a right-of-way. The Supreme Court of Utah held that the defendants' title under the placer patent was subject to the right-of-way and remanded the case to the District Court with directions to enter a judgment awarding to the plaintiff title to a right-of-way over the lands in question. When the case was sent back to the District Court, that Court entered a judgment adjudging the railroad company to be "the owner of a right-of-way" through the mining claim, and declaring the plaintiff's title to the right-of-way good and valid, and enjoining the defendants from asserting any claim whatsoever adverse to the plaintiff's said right-of-way. Plaintiff again appealed, insisting that it was only adjudged to be the owner of a right-of-way, when, according to the true effect of the Act of 1875, it had a title in fee simple. The Supreme Court of the State, however, said that if the railway company thought that the prior decision of the Supreme Court of the State did not correctly define and determine the extent of appellant's rights to the land in dispute, it should have filed a petition for rehearing; that the judgment entered by the District Court was in con-

formity with the decision of the Supreme Court, the latter having become the law of the case. The judgment was affirmed by the State Supreme Court. (38 Utah 113, 110 Pac. 868; 39 Utah 236, 115 Pac. 967.)

The Supreme Court of the United States said that the judgment under review described the railway company's right in the exact terms of the Act, and evidently used those terms with the same meaning they had in the Act, and so, interpreting the judgment, the United States Supreme Court said it accorded to the plaintiff all to which the plaintiff was entitled.

Concerning the right-of-way granted by the Act, the United States Supreme Court said what we have heretofore said on page 40 of this brief.

As we construe the decision, in *Rio Grande Western Ry. Co. v. Stringham,* the patentee of the placer claim and the owner of the surface thereof held the same subject to the right of way of the railroad, that is, the railroad's limited fee in a strip of land 200 feet wide, and extending downward so far as was necessary for right-of-way purposes; in other words, the surface and so much of the subsurface as is necessary for support. Except to this extent the railroad company had no interest in the land embraced in the mining claim. This right was what "attached" to the mining claim. The mining claim would have no right-of-way attached to it if the right-of-way was a separate ownership of the land extending to the center of the earth, and if the patent to the claim conveyed nothing within the right-of-way strip. But appellant also accepts the Government's patent "subject to such right-of-way".

To Whom Does Limited Fee Revert?

If such right-of-way is an "easement" 43 U. S. C. A. 940) or limited fee, we have seen that the limited fee is subject to an "implied condition of reverter".

Rio Grande W. Ry. Co. v. Stringham, supra, and cases cited in connection therewith.

But what has not ever been settled as a matter of law is the question of reverter. Reverter to whom? For if there are now existing two estates—an estate in the surface and an estate in the minerals, and the estate in the surface will revert to the patentee, will the minerals revert to some other? We think not. We think they are already vested in the patentee. The Act of May 21, 1930, in so far as it attempts to divest mineral rights heretofore granted by patents authorized by Congress is unconstitutional, and would not be urged in support of title in the Government.

As has been said, the better view is not that the minerals will revert with the surface, but that, by the issue of patent, and under the sections of the granting Act above quoted, *they have already vested in appellant.*

We think that these principles, if exhaustively examined, and presented to the trial Court, entitle appellant to assert in good faith that it has an opportunity to ultimately prevail if admitted to the case as intervener, and that it is not thereby burdening the record with any extraneous matter, or delaying the issue between the original parties.

Montana State Decisions Construing Railroad Right-of-Way Grants Hold Patentee May Remove Minerals.

After an exhaustive review we can state that in none of the decisions of either the United States Supreme Court or the State Courts, which declare the railway right-of-way obtained by Federal grant to be a limited fee simple estate, is it held that the railway company can remove oil or minerals. Nor are there any cases to the contrary. The question has simply not arisen. Further, there are no cases that say the Government can remove minerals. But, there are State cases in the jurisdiction of the Court below holding that a patentee of land traversed by a right-of-way can remove minerals so long as the railway *use* is not interfered with.

Northern Pacific v. Forbis (Montana, 1895), 39 Pac. 571.

This case is authority for the proposition that the railway right-of-way granted under the Act of July 2, 1864, does not take the owner's estate in the minerals or take away the owner's right to work the ground for the minerals if he can do so without interfering with the railway's estate in the easement. We believe that other earlier cases to the same effect, except that they are not under federal grant, are:

West Covington v. Freking, 8 Bush. 121;
Dubuque v. Benson, 23 Iowa 248;
Tucker v. Eldred, 6 R. I. 404;
Woodruff v. Neal, 28 Conn. 165;
Jackson v. Hathaway, 15 Johns. 447.

See also

Hollingsworth v. Des Moines Ry. Co., 63 Iowa 443, 19 N. W. 325,

and

Smith v. Hall (1897), 103 Iowa 95, 72 N. W. 427.

PETITION IN INTERVENTION SEEKS NO AFFIRMATIVE RELIEF AGAINST GOVERNMENT—MERELY DISMISSAL OF SUIT.

For the purpose of technical accuracy, it should be pointed out that technically the Government's complaint does not attempt, except indirectly by operation of a favorable judgment, to try title to land. The complaint states an alleged cause of action for an injunction. It is not an action to quiet title. Hence, the petition in intervention below does not seek to quiet intervener's title by cross-bill against the Government; the petition merely asks that the relief prayed in the defendant's answer be granted—that is, that the complaint be dismissed.

GOVERNMENT'S COMPLAINT IS COLLATERAL ATTACK ON ITS PATENTS BARRED BY STATUTE OF LIMITATIONS.

The United States, by its complaint below is seeking to vacate, annul or avoid the effect of its patent heretofore issued to appellant without giving it a chance to be heard, and, we believe, in attempted contraven-

tion of Section 8 of the Act of March 3, 1891 (26 Stat. 1099) which provides:

> "* * * suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

CONCLUSION.

In conclusion, let us consider broadly for a moment what may be very close to the truth we are seeking in connection with the entire problem.

We question whether Congress, between the time of the first railway grant in 1862 and the last, the Act of March 3, 1875, ever thought of the possibility of valuable mineral rights underlying a railroad right-of-way. In more proper legal phraseology, we question whether the idea of a surface severance with a reservation of the subsurface, or the question of mineral rights were thought of or considered by Congress. If the question of limiting the grant to surface rights had been considered, we conjecture it would have been pointed out that the railroad would need at least some subsurface rights for taking embankment materials, excavating cuts and tunnels, sinking wells for water and possibly for subways, and that, therefore, the surface alone would be insufficient. As to minerals, we conjecture it would have been pointed out that in such a long, narrow strip they would have been relatively unimportant, and that it

would be useless to reserve them to the Government unless the Government also reserved the right to enter and carry on mining operations. This would not be considered worth while on such a narrow strip, and would be objectionable because, unless consented to by the railroad, it might interfere with railroad operations. Whatever minerals there might be would ultimately be granted to someone, and, we again conjecture, it would be considered logical to grant them either to the owner of the surface or to the patentee. It is up to the Courts to make this decision after hearing the evidence affecting the question. If any valuable minerals were found, and ownership was in the railroad, they would serve the same purpose as the grants of alternate adjoining sections, and would aid financially in the construction and operation of the railroad. Coal and iron lands were specifically included in the grant of alternate adjacent sections and, presumably, underlying coal and iron would be included in the right of way grant. Petroleum deposits were then unknown in the West. If they had been known or thought of, they would probably have been treated like the coal. Placer gold dredging was then undreamed of. We question whether Congress would have created a severance of the subsurface or made a reservation of minerals under this narrow strip which was granted for railway purposes, any more than it did in granting homestead tracts for farms, but we feel certain that at the time Congress would not have reserved ownership in the United States.

We respectfully submit that intervention should be granted to appellant.

Dated, Wallace, Idaho,
November 3, 1939.

S. P. WILSON,
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(Appendix Follows.)

Appendix.

Appendix

THE SITUATION OF APPELLEE RAYMOND J. MacDONALD.

Pages 30 to 60 of the Transcript of Record deal with certain pleadings filed on behalf of appellee Raymond J. MacDonald. Technically they perhaps have no place in the record, since they were admitted in the case after the order here appealed from was entered by the Court below. (Transcript, bottom of page 29.) They are, however, included because after denying appellant's motion to intervene, the Court below made a "tentative" order that MacDonald's subsequent motion for leave to intervene "be allowed, 'tentatively' and counsel were directed to file brief thereon". (Transcript, page 28, ¶2.)

After argument upon the motion of MacDonald for leave to intervene the Court thus tentatively permitted him to appear in the action and present his contentions, subject, however, to a further consideration of the right of MacDonald to become a party to the action, and subject to a determination of the question as to whether the intervention constitutes a suit against the United States brought without its consent.

This appeal was taken because appellant was at a loss to classify the legal effect of the "tentative" allowance of the intervention, and felt that the record makes it clear that the Court below reserved the right to dismiss the appellee Raymond J. MacDonald from the proceedings below at will. Appellant felt that, should it allow its right of appeal to lapse, and

should the intervener MacDonald eventually be dismissed by the Court below, that the rights to raise the question presented by the petitions in intervention would be irrevocably lost. At the date of this writing appellant has not been advised of any action by the Court below clarifying its position with respect to the permanence of the allowance of the MacDonald intervention.

Even should the Court below finally permit MacDonald to remain in the case, appellant desires to prosecute this appeal for a right to be heard below, because of the very substantial difference in the question of law raised by paragraph XXII of appellee MacDonald's complaint (Transcript, page 46) in intervention and the issue raised by appellant by what are in other respects similar pleadings.

MacDonald does not assert a mineral right in the surface of the right-of-way as does appellant, who claims that such mineral right may be exercised by it with the consent of the railroad. We believe the Government would oppose appellant's claim on the theory that a public trust exists in the right-of-way, and like the other issues set out in the brief, cannot be tried in an independent suit brought for that purpose. We will urge below that gold dredging is not such an operation upon the land within the right-of-way (and outside an agreed distance from the center line of the tracks) as would, if conducted with the permission of the railroad, endanger the railroad or alienate any part of the right-of-way or the railroad's

dominion over the right-of-way so as to interfere with the full exercise of the franchises granted to the railroad by the Acts of Congress. It is therefore contended that the appellant's proposed operation is not in contravention of the rule laid down in Grand Trunk Ry. Co. v. Richardson, 91 U. S. 454, 468, or Northern Pacific v. Townsend, 190 U. S. 267. During and after the dredging, the right-of-way remains intact, and under the jurisdiction of the railroad, and is always available for exclusive railroad use at any moment. The MacDonald complaint, by the insertion of paragraph XXII, dodges effectively this issue.

We hope that the information contained in this appendix is sufficient explanation for appellant's diligent prosecution of this appeal notwithstanding the "tentative" allowance of intervention to MacDonald after denial to appellant.

S. P. Wilson,
Edward J. Bloom,
Attorneys for Appellant,
Star Pointer Exploration Company.

October 31, 1939.

No. 9274

In the United States Circuit Court of Appeals for the Ninth Circuit

STAR POINTER EXPLORATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.
JOHN B. TANSIL,
United States Attorney,
District of Montana.
C. R. DENNY,
NORMAN MacDONALD,
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INDEX

	Page
Opinion below	1
Question presented	1
Rule of Court involved	2
Statement	2
Argument	5
The order denying intervention rested in the discretion of the district court and therefore is not appealable	5
Appellant has no right to intervene because it lacks requisite interest in the subject matter of the suit	5
Appellant's claim of inadequacy of representation is without merit	7
Appellant's contention that its claim and the main action have a question of law in common is also without merit	9
Conclusion	11
Appendix	13

CITATIONS

Cases:	
Chandler Co. v. *Brandtjen*, 296 U. S. 53	7
Credits Commutation Co. v. *United States*, 177 U. S. 311	5, 6, 7
Demulso Corporation v. *Tretolite Corporation*, 74 F. 2d 805	6, 9
Ex parte Cutting, 94 U. S. 14	5
Farmers' & Merchants' Bank v. *Arizona M. S. & L. Ass'n.*, 220 Fed. 1	5
Glass v. *Woodman*, 223 Fed. 621	7
Radford Iron Co. v. *Appalachian Electric Co.*, 62 F. 2d 940	6, 7
Richfield Oil Co. v. *Western Machinery Co.*, 279 Fed. 852	8, 10
State of Washington v. *United States*, 87 F. 2d 421	6, 8, 10
United States v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116	7
Statutes and Rules of Court:	
Act of July 2, 1864, c. 217, 13 Stat. 365	3, 10, 11
Act of March 3, 1875, c. 152, 18 Stat. 482	2, 3, 4, 10, 11
Act of May 21, 1930, c. 307, 46 Stat. 373	2, 4
Federal Rule of Civil Procedure 24:	
Subdivision (a) (2)	2, 3, 7, 9
Subdivision (b) (2)	2, 3, 9
Texts:	
Moore, Federal Practice (1938), sec. 24.07, p. 2333	8

196138—39

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9274

STAR POINTER EXPLORATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not file an opinion. The order denying intervention, which was made and entered in open court, will be found in the record at pp. 26–29.

QUESTION PRESENTED

Whether in a suit by the United States to enjoin the removal of minerals underlying a railroad right-of-way a company claiming minerals underlying the right-of-way of another railroad has an interest in the subject matter of the suit entitling it to intervene as of right.

RULE OF COURT INVOLVED

Rule 24 of the Federal Rules of Civil Procedure, which relates to intervention, is printed in full in the Appendix, *infra,* pp. 13–14.

STATEMENT

In this suit, the United States seeks to enjoin the Great Northern Railway Company from drilling for or removing the oil and other minerals beneath the right-of-way granted to its predecessor under the Act of March 3, 1875, c. 152, 18 Stat. 482 (R. 6). The bill of complaint alleges that a portion of this right-of-way crosses certain designated sections of land all of which are in Glacier County, Montana (R. 4); that the Great Northern claims to own the underlying oil and minerals, and has threatened to drill for and remove them (R. 4); that the Great Northern and its predecessor did not acquire any right or interest in the oil and minerals by virtue of the Right of Way Act of March 3, 1875 (R. 5); that they remained the property of the United States (R. 4); and that the Great Northern has not obtained a lease to drill for and remove them pursuant to the Act of May 21, 1930, c. 307, 46 Stat. 373, or applied for such a lease (R. 5). In its answer, the Great Northern Railway Company admits that it intends to drill for and remove the oil and minerals, asserts that it owns them, and denies that the United States owns them (R. 7–10).

Star Pointer Exploration Company filed a motion and petition for leave to intervene (R. 13–20). It alleged that it is the successor to the patentees of certain land in Granite County, Montana, which is traversed by the

right-of-way of the Northern Pacific Railway Company which was granted under the Act of July 2, 1864, c. 217, 13 Stat. 365,[1] and as such owns[2] minerals beneath the Northern Pacific right-of-way (R. 15); that neither the United States nor the Great Northern owns the minerals beneath the Great Northern right-of-way, but that they belong to the patentees of the land crossed by the right-of-way (R. 16); that Rule 24 (a) (2) of the Federal Rules of Civil Procedure provides for intervention of right in suits where an applicant's interest is or may be inadequately represented and the applicant is or may be bound by the judgment, and Rule 24 (b) (2), for permissive intervention where the applicant's claim or defense and the main action have a question of law or fact in common (R. 16–17); that its interest is adverse to the United States and will not be represented, and that any attempted representation of its interest by the United States will be inadequate and it may be bound by the judgment (R. 17); that the question of law in the suit is whether the United States, the Great Northern, or the patentees of land traversed by the Great Northern right-of-way own the minerals thereunder (R. 18); that the suit ought not to be determined without a consideration of the rights of the class of property owners which it represents (R. 18); that its application to in-

[1] The petitioner alleged that the Northern Pacific right-of-way was granted "under the Acts of July 2, 1864, and March 3, 1875, and Acts supplementary thereto and amendatory thereof" (R. 15, 22). However, the reference to the Act of "March 3, 1875, and Acts supplementary thereto and amendatory thereof" is plainly incorrect.

[2] From Star Pointer Exploration Company's proposed bill of complaint, it appears that part of the land is under lease by the company (R. 23).

tervene ought to be granted because it is without authority to litigate or quiet its title against the United States to the minerals beneath the Northern Pacific right-of-way in an independent suit (R. 20).

Thereafter, Star Pointer Exploration Company filed a proposed complaint in intervention, which is designated "Intervention Pro Interesse Suo" (R. 21–25). It further alleges therein that the United States claims ownership of the minerals underlying the Northern Pacific right-of-way and asserts the right to enter upon the right-of-way and dispose of the minerals through its agents and lessees under the Act of May 21, 1930, c. 307, 46 Stat. 673 (R. 24); that the Great Northern claims to own and has threatened to remove the minerals underlying the Great Northern right-of-way (R. 24); and that any such removal of minerals by either the United States or the Great Northern constitutes a violation of the Right of Way Act of March 3, 1875, and will deprive it of its property (R. 24–25). It prayed that the complaint of the United States be dismissed (R. 25).

After a hearing, the district court denied the motion and petition for leave to intervene (R. 27–28), and Star Pointer Exploration Company has appealed from that order (R. 60–61).

Raymond MacDonald, Trustee, also filed a motion and petition for leave to intervene (R. 30–38). He alleged that he is a trustee for patentees of land in Glacier County, Montana, which is traversed by the Great Northern right-of-way, and as such trustee owns minerals beneath the Great Northern right-of-way (R. 30–38). The district court tentatively granted his motion and petition, and tentatively overruled the Gov-

ernment's contention that the motion and petition constituted a cross-bill against the United States upon which it had not consented to be sued (R. 28).

ARGUMENT

The order denying intervention rested in the discretion of the district court and therefore is not appealable

This appeal is predicated upon the theory that appellant had a right to intervene which was denied by the district court, and that the order denying intervention is therefore appealable (Br. 2–3, 18). It will be shown that appellant had no grounds for intervention as of right. It follows that appellant's application to intervene was addressed to the discretion of the district court and that the order denying intervention is therefore not appealable. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316 (1900); *Ex parte Cutting,* 94 U. S. 14, 22 (1876); *Farmers' & Merchants' Bank* v. *Arizona M. S. & L. Ass'n.,* 220 Fed. 1, 7 (C. C. A. 9, 1915).

Appellant has no right to intervene because it lacks requisite interest in the subject matter of the suit.— Appellant's claim of right of intervention (Br. 2–3, 8, 18) fails because it does not have a direct interest in the minerals underlying the Great Northern right-of-way, which are the subject matter of the suit. It does claim to own minerals which underlie the *Northern Pacific* right-of-way, but those minerals are not involved in this suit and will not be affected by the judgment.[3] Since

[3] Appellant appears to contend that it represents a class of patentees (Br. 5, 7, 26). However, it is not a member of the class of patentees along the Great Northern right-of-way and therefore cannot represent them. Moreover, it would avail appellant nothing to represent a class of patentees along the Northern Pacific right-of-way because that class has no greater rights than appellant itself.

appellant has no direct interest in the subject matter of the suit and its rights, if any, in minerals beneath the *Northern Pacific* right-of-way will not be affected by the judgment, its contention that it has no adequate relief due to its inability to sue the United States in an independent suit fails. For it is obvious that appellant has not shown any need for relief, and therefore that *State of Washington* v. *United States,* 87 F. (2d) 421, 434 (C. C. A. 9, 1936), principally relied upon by it, is inapplicable. The *State of Washington* case has application where the intervenor has a direct interest in the subject matter of the suit, and even then only where the judgment will affect the intervenor's interest.

Also, appellant's further contention (Br. 16–17), that it may be prejudiced unless allowed to intervene because the judgment may be a precedent adverse to its claim to minerals beneath the Northern Pacific right-of-way, is unsubstantial. The mere possibility of an adverse precedent does not vest an attempted intervenor with any interest in the subject matter of a suit which requires that he be granted intervention as of right. *Demulso Corporation* v. *Tretolite Corporation,* 74 F. 2d 805, 808 (C. C. A. 10, 1934); cf. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316 (1900); *Radford Iron Co.* v. *Appalachian Electric Co.,* 62 F. 2d 940, 942 (C. C. A. 4, 1933).

Appellant by its motion and petition for leave to intervene has simply attempted to introduce into the main suit an entirely unrelated claim. It is well settled that an attempted intervenor will not be permitted thus to broaden the scope of the litigation between the

original parties to the suit. *Chandler Co.* v. *Brandtjen,* 296 U. S. 53, 57–58, 59 (1935); *Glass* v. *Woodman,* 223 Fed. 621, 622–623 (C. C. A. 8, 1915).

Appellant's claim of inadequacy of representation is without merit.—Rule 24 (a) (2) of the Federal Rules of Civil Procedure, which is controlling in the case of a claim of this nature, reads:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *.

The rule refers to the "applicant's interest" without defining the nature of the interest required. It is largely, however, a codification of the requirements for intervention of right laid down in the prior decisions, Federal Rule of Civil Procedure 24 and Notes thereto. It is therefore certain that the interest required by the rule is an interest which has a direct connection with the subject matter of this suit, *United States* v. *Columbia Gas & Electric Corp.,* 27 F. Supp. 116, 120 (Del. 1939), such as was required for intervention of right under the prior decisions. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316 (1900); *Radford Iron Co.* v. *Appalachian Electric Power Co.,* 62 F. 2d 940, 942 (C. C. A. 4, 1933). Here appellant's claim of interest (R. 15, 23; Br. 6, 7) has no direct connection with the subject matter of the instant suit, which is the minerals beneath the Great Northern right of way.

Therefore, no question as to representation—much less as to inadequacy of representation—of appellant's

interest in the suit or as to appellant being bound by the judgment could properly arise.

It may be noted, however, as appellant points out in its petition for leave to intervene (R. 17) and in its brief (p. 7), that the United States does not represent any interest of appellant. It asserts (R. 4) a claim of right to the minerals beneath the Great Northern right-of-way purely in its own behalf. In those minerals, appellant has no interest to be asserted by anyone in this suit. Even assuming it had, the United States would still be asserting a claim of interest purely in its own right and not in the right of appellant. Although in that case appellant might apply to intervene, it could not apply for intervention of right on the ground that its claim of interest is represented by the United States. It would have to apply for intervention on other grounds, as for example that its claim and the main suit have a question of law in common. Even then, unless the judgment would be *res judicata* as to it, Moore, Federal Practice (1938) sec. 24.07, p. 2333, or would directly bind its rights in the subject matter of the suit, cf. *State of Washington* v. *United States,* 87 F. 2d 421, 434 (C. C. A. 9, 1936); *Richfield Oil Co.* v. *Western Machinery Co.,* 279 Fed. 852, 855 (C. C. A. 9, 1922), it would not be entitled to intervene as of right.

It may be noted further, as to appellant's contention that it will be bound by the judgment (Br. 16–17), that it does not contend that the judgment will be *res judicata* as to it, or even that the injunction sought, if granted, will affect its rights in the minerals beneath the Northern Pacific right-of-way. It contends that

it will be bound by the judgment only in the sense that the judgment may be a precedent adverse to its interests. No case has been found where an attempted intervenor has been held to be "bound" by the judgment under such circumstances. In the one pertinent case that has been found it was held that an attempted intervenor was not bound by the judgment under such circumstances. *Demulso Corporation* v. *Tretolite Corporation,* 74 F. 2d 805, 808 (C. C. A. 10, 1934). There would therefore seem to be no justification to grant appellant intervention as of right merely because of its inability to overcome the precedent by an independent suit against the United States, especially since it would mean, in every case in which an attempted intervenor's claim has a question of law in common with a main suit by the United States that he must be allowed to intervene as of right. In effect, a clearly unwarranted broadening of Rule 24 (a) (2) would result and an additional type of intervention of right for which the rule makes no provision would be created.

Appellant's contention that its claim and the main action have a question of law in common is also without merit.—Rule 24 (b) (2) of the Federal Rules of Civil Procedure reads:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As is plainly indicated, intervention under this rule rests in the discretion of the district court. Hence, as has been stated earlier, *supra,* pp. 5–6, unless appellant has a direct interest in the subject matter of the suit which may be affected by the judgment it cannot claim to intervene as of right merely because its claim and the main suit have a question of law in common. Cf. *State of Washington* v. *United States,* 87 F. 2d 421, 434 (C. C. A. 9, 1936); *Richfield Oil Co.* v. *Western Machinery Co.,* 279 Fed. 852, 855 (C. C. A. 9, 1922). It has already been shown, *supra,* pp. 5–6, that appellant has no such interest in the subject matter of the suit. Hence, insofar as intervention was sought on the ground of a common question of law, the order denying intervention rested in the discretion of the district court.

It may be noted, however, contrary to appellant's contention (Br. 18–19), that actually appellant's claim and the main suit do not have a question of law in common. The question of law in this suit will turn primarily upon the proper construction of the Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, under which the Great Northern right-of-way was granted. The question of law appertaining to appellant's claim to minerals under the Northern Pacific right-of-way will depend principally upon the proper construction of the Act of July 2, 1864, c. 217, 13 Stat. 365, under which the Northern Pacific right-of-way was granted. The fact that each question of law requires construction of a different Act means in itself that there are two distinct

and separate questions of law involved. This is especially true where as in this case the two Acts differ vitally in their terms. The Act of 1875, as appellant points out with emphasis (Br. 10), provides that "all such lands *over which* such right-of-way shall pass shall be disposed of *subject* to such right-of-way," but the Act of 1864 provides (sec. 6) that the homestead and preemption laws shall be extended to all lands within the Northern Pacific grant (secs. 2, 3) other than the odd sections, "*excepting* those hereby granted to said company." (Italics supplied.) The rights of patentees along the Great Northern right-of-way, therefore, may be quite different than those of patentees along the Northern Pacific right-of-way.

That the district court's denial of intervention was an exercise of a wise discretion is evident. The granting of intervention would compel the United States to litigate not only the issue of the rights of the original parties under the Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, but also the entirely separate issue as to the relative rights of the United States and appellant to minerals under the right-of-way granted by the Act of July 2, 1864, c. 217, 13 Stat. 365, which is not involved in the suit. If the discretion of the district court were to be exercised in appellant's favor, many others in appellant's situation, as well as patentees along the many railroad rights-of-way granted by the United States, might with equal claim upon the favorable discretion of the district court seek to intervene.

CONCLUSION

It has been shown that appellant had no right to intervene, and that the order denying intervention

rested in the discretion of the district court. It is therefore respectfully submitted that the appeal should be dismissed.

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JOHN B. TANSIL,
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District of Montana.
C. R. DENNY,
NORMAN MACDONALD,
ELY MAURER,
Attorneys, Department of Justice,
Washington, D. C.

DECEMBER 1939.

APPENDIX

Rule 24 of the Federal Rules of Civil Procedure provides as follows:

> (a) INTERVENTION OF RIGHT.—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.
>
> (b) PERMISSIVE INTERVENTION.—Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (c) PROCEDURE.—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same pro-

cedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, § 1.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 9277

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellant,

vs.

JAMES RALPH HUNT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	9
Appeal:	
Designation of additional parts of record on (Circuit Court of Appeals)	188
Designation of contents of record on (Circuit Court of Appeals)	187
Designation of contents of record on (District Court)	34
Notice of	34
Statement of points on (Circuit Court of Appeals)	185
Statement of points on (District Court)	180
Certificate to transcript	183
Complaint, Second Amended	2
Designation of additional parts of record on appeal (Circuit Court of Appeals)	188
Designation of contents of the record on appeal (Circuit Court of Appeals)	187
Designation of contents of the record on appeal (District Court)	34

Index

Page

Judgment 25

Motion to have judgment entered in accordance with defendant's motion for directed verdict and to set aside verdict and judgment 27

Names and addresses of attorneys of record 1

Narrative statement of the evidence (for detailed index see "Testimony") 36

Notice of appeal 34

Opinion denying motion for new trial 31

Order denying motion for judgment 39

Order formulating issues, pre-trial 14

Statement of evidence, Narrative (for detailed index see "Testimony") 36

Statement of points on appeal (Circuit Court of Appeals) 185

Statement of points on appeal (District Court) 180

Testimony 36

Designation of points on appeal, appellant's 180

Exhibits for defendant:

2, 3, 4 and 5—Photographs of filling station where plaintiff worked. [Not set out.]

6, 7 and 8—Tire irons and a weaver jack (Photograph) 149, 150

10, 11, 12, 14, 15, 16, 17, 18 and 19—Drafts issued by Hartford Accident and Indemnity Company to

Index Page

Exhibits for defendant: (cont.)

9—Draft dated July 20, 1934 to E. W. Simmons, M. D., $7.50 153

13—Draft dated April 27, 1935 to Emanuel Hospital, $163.35 153

20—Draft dated November 7, 1935 to R. B. Dillehunt, M. D. $414.50 153

26—Standard Workmen's Compensation and Employers liability policy issued by Hartford Accident and Indemnity Co. to Union Service Stations, Inc., No. US 519380 153

27—Renewal policy of insurance identical in form as defendant's Exhibit 26 160

33—Surgeon's report to Hartford Accident and Indemnity Company by Dr. R. B. Dillehunt dated May 17, 1935 160

35—Certificate from the Corporation Commissioner of the State of Oregon showing that the Union Service Station, Inc., had withdrawn from doing business in the State of Oregon 161

Index

Page

Exhibits for plaintiff:

22, 23—Transmittal letters on Hartford Accident and Indemnity Company stationery signed by Harry G. Hadfield, Claim Adjuster 162

41 to 55—Applications made by plaintiff to Macabees for disability payments 162

Instructions to Jury 168

Motion for non-suit, defendant's 166

Narrative statement of issues 163

Witnesses for defendant:

Hadfield, Harry G.

—direct 131

Russell, A. M.

—direct 146

Witnesses for plaintiff:

Coats, Ernest H.

—direct 85

Hunt, James Ralph

—direct 36

—cross 83

—recalled, redirect 99

—cross 109

—recalled, direct 143

Keith, Everett L.

—direct 89

Verdict 25

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In the District Court of the United States for the District of Oregon

November Term, 1937

Be It Remembered, That on the 4th day of December, 1937, there was duly filed in the District Court of the United States for the District of Oregon, a Second Amended Complaint in words and figures as follows, to wit: [1*]

In the District Court of the United States for the District of Oregon

No. L 12711

JAMES RALPH HUNT,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and UNION SERVICE STATIONS, INC., a corporation.

Defendants.

SECOND AMENDED COMPLAINT

Plaintiff complains of Defendants and alleges:

I.

That Defendants are corporations, organized and existing under and by virtue of the laws of the State of California, and at all times herein mentioned were doing business in the State of Oregon at 3230 N. E. Union Avenue in the City of Portland therein.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

That at all times herein mentioned, particularly between on or about the 1st day of June, 1934, and on or about the 30th day of November, 1934, Defendants were engaged at said location in the operation and control of a workshop, yard and service station wherein they maintained, employed and operated machinery, including machinery moved and operated by power other than hand power, and were using electricity and dangerous appliances and exercising manual labor for gain, for the purpose of and incidental to the purpose of servicing, repairing and adapting for use motor cars and trucks, all of which work involved great risk and danger to their employees, including Plaintiff, and over all of which said property and equipment Defendants at all times herein mentioned had charge and control and the right of access.

III.

That on or about the 12th day of June, 1934, Plaintiff, under the directions of Defendants and while employed by them, was ordered and caused to attempt to change and dismount an [2] automobile tire from a wheel rim with tire irons and levers carelessly, recklessly and negligently furnished Plaintiff by Defendants, in that the latter tools were so short, narrow, and inefficient that Plaintiff, while in the exercise of due care on his part, in endeavoring to use the same as hereinbefore described, was caused to strain, sprain and injure his back, and the tissues, tendons, muscles, bones and nerves

thereof, and was thereby rendered sick and debilitated and made necessarily to secure medical service and assistance and to have his back enclosed in a special medical belt or brace, which medical service and equipment Defendants furnished and supplied, and to be confined at his home and remain away from his work for a period of three weeks, all of which facts at all times herein mentioned were and now are well known to Defendants, and at no time herein mentioned did Defendants furnish Plaintiff in or about their said workshop with longer and wider tire irons or levers with which to change or dismount automobile tires, although such last said tools are simple, and it was and is practicable to secure such longer and wider tire irons, and many of the latter type of said tire irons are in common use in and about the community in which Defendants at the times herein complained of were conducting said workshop.

IV.

That on or about the 14th day of July, 1934, Defendants, while so treating him for said injuries, directed Plaintiff to return to work for Defendants at said location, and that on or about the 5th day of October, 1934, while Plaintiff was so employed as hereinbefore alleged, Defendants required Plaintiff to go a considerable distance from said workshop to change an automobile tire for a customer of Defendants, and Defendants willfully, wantonly, wrongfully and negligently failed to provide and furnish

Plaintiff with a safe, or any device, tool, or equipment for raising an automobile while in the process of changing a tire thereof, and particularly a jack so constructed that the operator thereof, while so changing automobile tires, could be and remain away from [3] underneath the automobile, and any other place exposed to danger, while it was being raised in said process, and failed to use any care or precaution for the protection of life and limb while he was so engaged, and particularly failed to provide Plaintiff with an able-bodied assistant, although there were at all times herein complained of, several forms of safe devices, tools and equipment in use in the City of Portland which were practicable to be used and which when used provided safe working conditions for and care and protection to the life and limb of persons engaged in work, as was Plaintiff as herein complained of, including safe automobile jacks as above described, and able-bodied assistants, and that such safe devices, tools, equipment, automobile jacks and able-bodied assistants in no way would have lessened the efficiency of any tool or apparatus employed by Defendants in the operation of said workshop and service station, and that because of Defendants' failure to furnish such safe devices, tools and equipment, Plaintiff, while so in obedience to the orders of Defendants, was required and compelled to use a device or automobile jack alone and without assistance and to crawl under the automobile of said customer of Defendants and remain thereunder while raising the

same as a part of the process of changing said tire, and that operation of said automobile jack was particularly dangerous to said Plaintiff.

V.

That as a result of Defendants' said action as herein complained of, the said automobile of Defendants' customer was caused to slip from the said jack so used by said Plaintiff, and to fall upon said Plaintiff and strike his body in the region of his back and legs and hips, particularly the part of his body which had been injured as heretofore mentioned, and to bruise, strain and sprain the muscles, tissues, tendons and ligaments of his back, hips and shoulders and to break and crush the bones of his back, and to cause him to suffer great pain and shock and to become unconscious and immediately following said blow to become paralyzed and confined to his bed for about one week, whereupon [4] Defendants assumed and proceeded to supply Plaintiff with medical treatment through doctors employed by Defendants, and that on or about the 15th day of October, 1934, said doctors advised and recommended a major operation for Plaintiff because of his injuries, and when Defendants finally authorized said operation, Plaintiff's injuries and the pain and anguish thereof had become greatly increased, and said second injury had greatly aggravated and increased the injurious effect upon Plaintiff of the said first injury, and had caused the nerves, tendons, muscles, and tissues in and about

Plaintiff's back to become irritated, inflamed, and sore and caused lime to be deposited in and about the region of said injuries and to increase the area and extent of Plaintiff's injuries, which are permanent as herein set forth, and it was necessary to fuse or fasten together several of Plaintiff's vertebrae and his pelvis into one large bone, and to destroy the mobility of the parts thereof, rendering Plaintiff permanently crippled, handicapped and incapacitated, with his back permanently stiffened and the movements of his body greatly lessened and impaired and its usefulness permanently restricted and largely destroyed, all of which impairment and restricted condition are likely to increase, and that from the time of said operation until on or about the 21st day of April, 1935, Plaintiff was confined to a hospital, and from on or about April 21, 1935, until on or about the 1st day of July, 1935, Plaintiff was confined to his home with his back in a brace during all of which time, from the date of said second injury until the last said date, Plaintiff was under constant care of Defendants through their physicians and continued to be for many months thereafter in order to become cured as far as possible of said injuries, and suffered great pain and anguish, mental and physical, all of which conditions are permanent and are likely to increase.

VI.

That prior to the injuries herein complained of, Plaintiff was a strong, active, athletic and capable young man, able to work hard at his business and

advancing therein, and engaged in athletic contests, but as a result of said injuries he can no longer endure [5] hard physical work and is not efficient therein and is no longer able to enjoy and compete in athletics, and has had to seek employment requiring less physical activity, and must spend large sums of money to become rehabilitated because of his said permanent injury and incapacity.

VII.

That on or about the 1st day of July, 1932, Defendant Union Service Stations, Inc., rejected the Workman's Compensation Law of the State of Oregon, and that said rejection became effective upon last said date, and has continued to be effective at all times since, and that on or about the 1st day of July, 1934, Defendant Union Oil Company of California rejected the Workman's Compensation Law of the State of Oregon, and that its said rejection became effective upon last said date, and has continued to be effective at all times since.

VIII.

That as a direct result of said negligent, wrongful, wanton and willful conduct, acts and omissions of defendants as hereinbefore alleged, Plaintiff has been damaged and injured in the sum of $35,000.00.

IX.

That by reason of said negligent, wrongful, wanton and willful conduct on the part of Defendants, and as a warning to other wrongdoers, Defendants

should be required to pay Plaintiff exemplary or punitive damages in the sum of $10,000.00.

Wherefore, Plaintiff demands judgment against defendants and each of them in the sum of $45,000.00, together with his costs and disbursements incurred herein.

GEO. L. RAUCH,
Attorney for Plaintiff.

[Endorsed]: Filed December 4, 1937. [6]

And afterwards, to wit, on the 3rd day of October, 1938, there was duly filed in said Court, an Answer to Second Amended Complaint, in words and figures as follows, to wit: [7]

[Title of District Court and Cause.]

AMENDED ANSWER TO SECOND AMENDED COMPLAINT

Comes now the defendants and for answer to plaintiff's second amended complaint, admit, deny and allege as follows:

I.

Deny Paragraphs I, II, III, IV, V, VI, and VIII of the complaint and the whole thereof, except insofar as the same agrees with and conforms to the allegations and statements set forth in the affirmative defenses hereinafter set up by defendants.

II.

Admit Paragraph VII of the complaint.

For a first, further and separate answer and defense, defendants allege:

I.

That defendant, Union Oil Company of California is a corporation and at all times mentioned in the complaint and in this answer was doing business in the State of Oregon;

II.

That the Union Service Stations, Inc., formerly a corporation doing business in this State, ceased to do business in this State as a corporation on July 1, 1934, and on that date through dissolution ceased to exist as a corporation. [8]

III.

That the plaintiff, James Ralph Hunt, was in the employ of the Union Service Stations, Inc., during the month of June, 1934, as a filling station attendant at a filling station located at 3230 N. E. Union Avenue in the City of Portland, Oregon, and on about June 12th, 1934, plaintiff complained of having strained his back in connection with his work as a filling station attendant at which time, plaintiff was sent to and received medical attention from Dr. R. B. Dillehunt. On July 1, 1934, Plaintiff entered the employ of the Union Oil Company. Thereafter and during the month of November, 1934, the plaintiff, while working as a filling station attendant

at the aforesaid filling station, again complained that his back was still bothering him, at which time he went back to Dr. R. B. Dillehunt for further examination, and Dr. Dillehunt found that the sprain complained of on June 12, 1934, was a continuing condition and thereafter performed an operation on the plaintiff for a chronic lumbo-sacro instability, and that said operation was a very successful one; that in connection with said operation for a chronic lumbo-sacro instability, the plaintiff was in the hospital and lost several months time from his employment; that compensation payments were made to the plaintiff on behalf of the Union Service Stations, Inc., for all the time that plaintiff lost from his work; that the plaintiff accepted these compensation payments as payment in full for any and all claims that he might otherwise have had against the Union Oil Company and the Union Service Stations, Inc., and made settlement in full and released the said Union Oil Company and said Union Service Stations, Inc., and fully compromised his claim with said defendants for the same matter which he is now claiming for in his complaint herein. That there was paid to the plaintiff herein the sum of $235.30 as compensation as payment in full for his said claim and there was paid on his account the sum of $414.50 to Dr. R. B. Dillehunt and the sum of $163.35 to the Emanuel Hospital and the sum of $7.50 to Dr. E. W. Simmons. Said plaintiff [9] accepted these compensation payments in full settlement for the claim which he now sets forth in his complaint.

IV.

That plaintiff at the time of his alleged back trouble as set forth in his complaint and prior thereto, was suffering from a congenitally weak back, known as a congenital*ly* anomaly, and plaintiff's back was vulnerable to stress and strain; and to overcome this congenital condition and to strengthen plaintiff's back, Dr. Dillehunt performed an operation on plaintiff's back and the aforesaid instability has been cured and plaintiff's back was benefited by said operation, and plaintiff has been able to carry on his usual work ever since he recovered from the operation.

For a second further and separate answer and defense, defendants allege:

I.

Plaintiff was familiar with all the circumstances and conditions surrounding his work at said filling station and if there was any risk or danger in connection with the using of the tools referred to in changing automobile tires, such risk and danger was assumed by the plaintiff.

For a third further and separate answer and defense, defendants allege:

I.

That plaintiff claims he injured his back while changing an automobile tire. If plaintiff did strain his back as alleged, it was through no fault or carelessness on the part of these defendants, but was the

result of plaintiff's own carelessness and negligence. Plaintiff, himself, was in the best position to know his own strength and these defendants would not be liable for over-exertion, if any, on the part of the plaintiff. [10]

II.

That the defendant, Union Oil Company of California, was under the State Workmen's Compensation Act during the month of June, 1934, at which time plaintiff claims to have strained his back and no action can be maintained against this defendant for said alleged injury.

III.

That the plaintiff was not employed in any capacity by the defendant, Union Service Stations, Inc., subsequent to July 1, 1934, and performed no services for said defendant subsequent to that time.

Wherefore, defendants having answered plaintiff's second amended complaint, pray that the same be dismissed and that they have judgment against plaintiff for their costs and disbursements herein.

(Sgd.) JAMES ARTHUR POWERS,
Attorney for Defendants.

[Endorsed]: Filed October 3, 1938. [11]

And afterwards, to wit, on Wednesday, the 14th day of December, 1938, the same being the 32nd Judicial day of the Regular November, 1938, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[Title of District Court and Cause.]

ORDER FORMULATING ISSUES

Admissions

The above entitled cause coming on to be heard on the 12th day of December, 1938, on the Order of the Court for a pre-trial, plaintiff appearing in person and by his attorney, Geo. L. Rauch, Defendant appearing by its Service Station Supervisor, Mr. Winn, and James Arthur Powers, its attorney; the cause proceeded upon a pre-trial, certain exhibits were introduced and certain facts were admitted and the Court being fully advised in the premises:

Now, Therefore, in accordance with the rules of Civil Procedure, the Court finds the following facts admitted:

1. That the Union Oil Company of California is a corporation organized and existing under and by virtue of the laws of the State of California and at all times mentioned in the Complaint and Answer herein was doing business in the State of Oregon.

2. That on or about the 12th day of June, 1934, plaintiff was employed by the Union Service Stations, Inc.

3. That on or about the 14th day of July, 1934, after being absent because of a strained and debilitated condition of his back, returned to work at the filling station located at 3230 N. E. Union Avenue, in the City of Portland.

4. That on or about the 28th day of February, 1935, [12] plaintiff entered the hospital and was discharged April 20, 1935, and that while so in the hospital on the 1st day of March, 1935, an operation was performed upon him, known as a lumbosacral fusion operation, and that following the operation his back was placed in a brace.

5. That on or about the 1st day of July, 1932, Defendant Union Service Stations, Inc., rejected the Workmen's Compensation law for the State of Oregon and which rejection continued to be in effect through the month of June, 1934, said rejection never having been cancelled; and on July 1, 1934, the defendant Union Oil Company of California rejected said Workmen's Compensation law of Oregon and its rejection of the same became effective on said date and has continued to be effective at all times since.

6. That the plaintiff was in the employ of the Union Service Stations, Inc., during the month of June, 1934, as a filling station attendant at its filling station located at 3230 N. E. Union Avenue in the City of Portland, Oregon.

7. That on or about the 12th day of June, 1934, plaintiff complained of having strained his back in connection with his work as a filling station atten-

dant at which time defendant sent plaintiff to Dr. R. B. Dillehunt and received medical attention and at that time it was found that plaintiff had a strained back affecting the tissues, tendons, muscles, bones and nerves thereof. Medical services were necessary and plaintiff's back was enclosed in a medical brace or belt furnished through said doctor. That on the first day of July, 1934, plaintiff was in the employ of the Union Oil Company.

8. That defendant, Union Oil Company of California was under the Workmen's Compensation law of Oregon during the month of June, 1934.

9. That defendants knew on or about June 12, 1934, that plaintiff was suffering from a strained back and that thereafter [13] and when he returned to work at the said filling station located at 3230 N. E. Union Avenue, plaintiff had to wear a special medical belt or brace which had been furnished and supplied to plaintiff by Dr. Dillehunt.

10. That one of the defendants after the date on which the said second injury is alleged to have occurred supplied plaintiff with medical treatment including a lumbosacral operation.

Issues

The following matters alleged in the plaintiff's complaint and defendants' answer and the materiality and competency thereof are in dispute, namely:

1. Whether or not the defendant Union Service Stations, Inc., was doing business in the State of Oregon subsequent to July 1, 1934.

2. Whether or not defendants, or either of them, were engaged between on or about the 1st day of June, 1934, and on or about the 30th day of November, 1934, at 3230 N. E. Union Avenue, sometimes known as the corner of Union and Fargo Streets in the City of Portland, Oregon, in the operation of an activity governed and controlled by the Employers Liability Act, known as section 49-1701 to Section 49-1706 inclusive, of the Oregon Code 1930.

3. Whether or not between the dates last named and the location mentioned in the preceding paragraph, defendants or either of them were operating any machinery, including a machine moved and operated by power other than hand power, with electricity or any dangerous appliances or substance exercising manual labor for gain, or any work involving risk and danger to their employees or the employees of either of them including plaintiff, or generally having charge of or responsible for any work involv- [14] ing a risk or danger to their employees including plaintiff or employees of either of them including plaintiff, and if so, whether or not such defendants or either of them used every device, care, and precaution which is practical to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or devices and without regard to the additional costs of suitable materials or safety appliances and devices.

4. Whether or not on or about the 12th day of June, 1934, plaintiff under the directions and while

employed by the defendants or either of them, was ordered and caused to dismount an automobile tire from a wheel rim with tire irons and levers carelessly and recklessly furnished plaintiff by defendants or either of them which were short, narrow and inefficient; and whether or not while endeavoring to use the same plaintiff was caused to injure his back making necessary medical service and had his back enclosed in a special medical belt furnished and supplied by the defendants or either of them and to be confined at his home for a considerable period; and whether or not it is practicable to secure longer and wider tire irons and whether or not any longer and wider tire irons were in common use in the community in which defendants were conducting the activity hereinbefore described and conducted at said location hereinbefore mentioned.

5. Whether or not while plaintiff was being treated at the direction of defendants or either of them, he was directed by them or either of them to return to the said location and whether or not on or about the 5th day of October, 1934, plaintiff while so employed was required by defendants or either of them, to leave said place of business and change an automobile tire for a customer and whether or not while doing so the said [15] automobile fell on plaintiff injuring his back.

6. Whether or not defendants or either of them wantonly or negligently failed to provide plaintiff with a safe device or tool for raising the automobile while changing a tire thereof, particularly a jack so

constructed that an operator, including plaintiff while so changing such a tire, could be away from and unexposed to danger while such an automobile was being raised; and whether or not defendants or either of them failed to use care, or precaution for the protection of plaintiff while so engaged including the failure to provide plaintiff with an able-bodied assistant; whether or not at the times herein complained of, devices and tools were in use in the City of Portland which were practicable to be used and which when used afforded safe working conditions for the protection of persons such as plaintiff, engaged in such work, including safe automobile jacks and able-bodied assistants.

7. Whether or not such safe devices and tools and able-bodied assistance would have lessened the efficiency of such tool or apparatus when employed by defendants or either of them in the operation of its said activity at said location; and whether or not under such conditions and as a result thereof, plaintiff was required by defendants or either of them to use an automobile jack alone without assistance which caused him to be put in a place of danger while raising such an automobile with particular danger to plaintiff.

7a. Whether the tools furnished were safe and if not whether such tools and able-bodied assistance would have lessened the efficiency of such tool or apparatus when employed by defendants or either of them in the operation of its said activity at said location; and whether or not defendants, or either

of them, were negligent in furnishing plaintiff with an automobile jack to be used by him alone and without an able-bodied assistant. [16]

8. Whether or not defendants or either of them required plaintiff to use such an inefficient and dangerous jack that said automobile was caused to slip from said jack and to fall upon plaintiff and to strike him in the region of his body and legs, including the part of his body injured by reason of said inefficient tire irons on or about the 12th day of June, 1934, and to bruise, sprain and injure, break and crush his back, hips and the bones thereof, and to cause him great pain and shock and to become unconscious following said blow and to become paralyzed and to be confined to his bed for about one week; and whether or not said second injury aggravated and increased the injurious effect upon plaintiff of said first injury; and whether or not such second injury, including aggravation of said first injury, caused the nerves, tissues, bones and muscles of plaintiff's back to become irritated, sore and lime to be deposited about the region of said injury; and whether or not such injuries as hereinbefore set forth are permanent and whether or not as a result of said alleged second injury and alleged aggravation it was necessary to fuse together some of plaintiff's vertebrae and his pelvis and to destroy the mobility of plaintiff's back and limbs and caused him to become permanently crippled and handicapped and the usefulness of his body impaired.

9. Whether or not after a period of confinement in the hospital terminating the 20th day of April, 1935, until on or about the first day of July, 1935, plaintiff was confined to his home with his back in a brace; and whether or not from the date of said second injury until on or about last said date, plaintiff was under the care of physician employed by defendants or either of them.

10. Whether or not plaintiff suffered as a result of said second injury and said aggravation of the first, pain and anguish mental and physical and whether or not such conditions are [17] permanent and likely to increase.

11. Whether or not prior to the said injuries particularly said second injury and said aggravation of the first, plaintiff was a strong, athletic young man, able to work hard at all forms of his occupation and engage in athletics, and whether or not as a result of said alleged second injuries including said aggravation if any of said first injury he now can no longer endure hard physical work and is not efficient therein, and is no longer able to enjoy and compete in athletics.

12. Whether or not he has to seek employment requiring less physical activity particularly for his back and whether or not he must spend large sums of money in order to become rehabilitated because of the permanency of his injury and its resulting incapacity.

13. Whether or not plaintiff because of the said negligent acts of defendants or either of them has

been damaged or injured in the sum of $35,000.00.

14. Whether or not the acts of defendant or either of them herein complained of by the plaintiff were wanton or wilful and if so whether defendants or either of them should be required to pay plaintiff as exemplary damages the sum of $10,000.00.

15. Whether or not during the month of November, 1934, plaintiff while working as a filling station attendant at the aforesaid location where defendant Union Oil Company was conducting a filling station, plaintiff again complained that his back was still bothering him and whether or not he went back to Dr. Dillehunt for further examination and whether or not said Dr. Dillehunt found that the said sprain complained of on June 12, 1934, was a continuing condition and thereafter performed an operation on plaintiff for a chronic instability, and whether or not such operation was successful and whether or not plaintiff was in the hospital in connection with said operation for chronic [19] lumbrosacral instability from Feb. 28, 1935, to April 20, 1935, and whether or not plaintiff while in the hospital and later while recovering lost several months' time from his employment.

16. Whether or not compensation payments were made to plaintiff on behalf of Union Service Stations, Inc., for all the time plaintiff lost from his work and whether or not plaintiff accepted such compensation payments as payment in full for any and all claims that he might otherwise have against

Union Oil Company of California and Union Service Stations, Inc., and whether or not he made settlements in full and released Union Service Stations, Inc., and Union Oil Company of California and fully compromised his claim with said defendants for the same matter and alleged injuries which he is now claiming for in his complaint herein and whether or not there was paid to plaintiff the sum of $235.30 as compensation as payment in full for his said claim and there was paid on his account the sum of $414.50 to Dr. Dillehunt and $163.35 to Emanuel Hospital and $7.50 to Dr. E. W. Simmons

17. Whether or not plaintiff at the time of his said back trouble as alleged in his complaint and prior thereto, was suffering from a congenitally weak back known as a congenital anomaly and whether or not plaintiff's back was vulnerable to stress and strain, and whether or not to overcome said condition and to strengthen plaintiff's back Dr. Dillehunt performed an operation on plaintiff's back and whether or not the aforesaid instability has been cured and plaintiff was benefited by said operation and whether or not plaintiff has been able to carry on his usual work since he recovered from said operation.

18. Whether or not plaintiff was familiar with the circumstances and conditions surrounding his work at said filling station and whether there was any risk and danger in using the tools referred to in changing automobile tires and if so whether [18] plaintiff assumed the same.

19. Whether or not if plaintiff did injure and strain his back as alleged in his complaint, it was through and as a result of his own carelessness and negligence.

20. Whether or not plaintiff did strain and injure his back as alleged in his complaint and if so whether it was through over exertion on his own part and whether plaintiff can maintain an action against the Union Oil Company because during the month of June, 1934, it was under the Oregon Workmen's Compensation Act.

21. Whether or not plaintiff was at any time employed in any capacity or performed services for defendant Union Service Stations, Inc., subsequent to July 1, 1934.

That this order be filed and recorded, and substituted for the pre-trial order also signed on this date.

Dated this 14th day of December, 1938.

CLAUDE McCOLLOCH.

[Endorsed]: Filed December 14, 1938. [20]

And afterwards, to wit, on the 22nd day of December, 1938, there was duly filed in said Court, a Verdict, in words and figures as follows, to wit: [21]

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled to try the above entitled cause, do find our verdict for the Plaintiff and against the Defendant and assess the Plaintiff's damages in the sum of $6,000.

MAX KLIGEL,

Foreman.

[Endorsed]: Filed December 22, 1938. [22]

And afterwards, to wit, on Thursday, the 22nd day of December, 1938, the same being the 39th Judicial day of the Regular November, 1938, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [23]

In the District Court of the United States for the District of Oregon

No. L 12711

JAMES RALPH HUNT,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

JUDGMENT

This cause came on for trial upon the 15th day of December, 1938, before the Honorable Claude McColloch, one of the judges of the above entitled Court, Plaintiff appearing in person and by his counsel, George L. Rauch and Francis I. Smith, and the Defendant appearing by its agents and counsel, James Arthur Powers, a jury was duly impaneled and sworn to try this cause, the opening statements of counsel were made, witnesses on behalf of the respective parties herein were sworn and introduced evidence for the respective parties herein and after all the evidence had been heard by the jury, the closing arguments of respective counsel were made, the jury was then instructed by the Court and the trial having been adjourned and continued from day to day, the jury did on the 22nd day of December, 1938, return its verdict for the Plaintiff and against the Defendant, and did assess the Plaintiff's damages in the sum of $6,000.00.

Now, Therefore, the Court being fully advised in the premises, It Is Hereby Ordered and Adjudged that Plaintiff, James Ralph Hunt have and recover from Defendant, Union Oil Company of California, a corporation, the sum of Six Thousand Dollars ($6,000.00) and his costs and disbursements incurred herein in the sum of $52.50.

CLAUDE McCOLLOCH,
Judge.

Done and dated at Portland, Oregon, this 22nd day of December, 1938.

[Endorsed]: Filed December 22, 1938. [24]

And afterwards, to wit, on the 29th day of December, 1938, there was duly filed in said Court, a Motion to have judgment entered in accordance with defendant's motion for directed verdict, and to set aside verdict and judgment, in words and figures as follows, to wit: [25]

[Title of District Court and Cause.]

MOTION TO HAVE JUDGMENT ENTERED HEREIN IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND SETTING ASIDE THE VERDICT AND JUDGMENT AS ENTERED.

MOTION FOR NEW TRIAL AND SETTING ASIDE VERDICT AND JUDGMENT ENTERED HEREIN.

Comes now the defendant and moves the Court for an order of judgment setting aside the verdict and judgment heretofore entered herein and entering a judgment in accordance with defendant's motion for a directed verdict made at the conclusion of the evidence in the within case.

* * * * * * *

Comes now the defendant and moves the Court for an order setting aside the verdict and judgment heretofore entered and for a new trial herein on the grounds and for the reason:

1. That upon the facts and the law the plaintiff has shown no right to relief and that there is an insufficiency of the evidence to justify the verdict and that the verdict and judgment are against the law.

2. Error in law occurring at the trial and duly excepted to by the defendant in submitting to the Jury for construction and interpretation the written documents and agreements of the parties which were for the Court to construe and determine their legal effect as a matter of law.

3. Error in law in permitting plaintiff to retain the fruits of his contract without subjecting him to or imposing upon him the obligations thereof.

4. Error in law in failing to rule that the accepting of [26] compensation payments and other benefits under the Workmen's Compensation endorsement of the policy and the signing of a release on the back of the drafts constituted a satisfaction, release and settlement for the same injuries.

5. On the ground that the defendant was prevented from having a fair and impartial trial by reason of the plaintiff being allowed to introduce during his rebuttal his entire medical testimony in chief and thus depriving the defendant of an opportunity to answer or counteract said medical testimony.

6. Excessive damages appearing to have been given under the influence of passion and prejudice, and there being no competent medical testimony to support the verdict and judgment.

JAMES ARTHUR POWERS,
Attorney for Defendant.
Address: 610 American Bank Bldg., Portland, Oregon.

[Endorsed]: Filed December 29, 1938. [27]

And afterwards, to wit, on Tuesday, the 7th day of March, 1939, the same being the 2nd Judicial day of the Regular March, 1939, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon

No. L-12711

JAMES RALPH HUNT,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

ORDER OVERRULING DEFENDANT'S MOTION FOR JUDGMENT ON DEFENDANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT AS ENTERED AND MOTION FOR NEW TRIAL AND SETTING ASIDE VERDICT AND JUDGMENT.

The above coming on to be heard before the Honorable Claude McColloch, one of the Judges of the above entitled Court on the 11th day of January, 1939, upon Defendant's Motion to have Judgment entered herein for a Directed Verdict and setting aside the Verdict and Judgment as entered, and

upon Defendant's Motion for a new trial, Plaintiff appearing by Francis I. Smith, one of his attorneys, and Defendant appearing by James Arthur Powers, its attorney, and the Court having heard the arguments of respective counsel upon the said Motions; and Memorandum of Defendant's Authorities and answering and replying Memoranda having been filed;

And It Appearing to the Court that Defendant's said Motions should be overruled and the Court being fully advised in all the premises;

Now Therefore, It Is Hereby Ordered and Adjudged that Defendant's Motion to have Judgment entered herein in accordance with Defendant's Motion for a Directed Verdict and setting aside the Verdict and Judgment as entered and Defendant's Motion for a new trial and setting aside Verdict and Judgment entered herein, be, and the same are, hereby overruled.

Dated this 7th day of March, 1939.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 7, 1939. [29]

And afterwards, to wit, on the 10th day of March, 1939, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit: [30]

[Title of District Court and Cause.]

MEMORANDUM OPINION DENYING MOTION FOR NEW TRIAL

At the time I denied the Motion for new trial, I stated I would file a memorandum giving my reasons for denying the Motion.

My only serious doubt on the Motion, arose in connection with the defense of assumption of risk, which was submitted to the jury following the ruling that the State Employer's Liability Act did not apply.

Here is a case where station employees were encouraged, under sales pressure, to go off the employer's premises to render services. This is the plaintiff's theory.

Plaintiff testified that the owner of the car which he was called to service, was drunk and could not find the key to the back of the disabled car, where the tools were kept. It then became necessary for plaintiff to use his own short-handled jack, which he could not fit into position without getting under the car; that he was crawling out when the car slipped from the jack and injured his back. Plaintiff says that if he was expected to answer calls away from the service station to do this kind of work, he should have been provided with a jack which could be operated without having to get under low-slung cars. [31]

The Oregon Supreme Court in several decisions has relaxed the rigors of the common law doctrine

of the assumption of risk. The Oregon Court has referred to the doctrine as "harsh".

It seems to me the question presented is: what duty, if any, the employer owed to the employee under the circumstances presented, rather than assumption on the employee's part of the risks involved in doing this off-the-premises work. The case is not one where an employee used a defective tool provided by the employer and known by the employee to be defective. The employer provided no tool at all suitable for the away-from-the-station work. When the plaintiff reached the disabled car, he might have found the car owner sober enough to let him into his own tools, and there found the same kind of unsuitable jack as the employee's own. Having used the car owner's jack with the same unfortunate result, would it be said that the employee assumed the risk that the disabled car owner would not have had adequate tools?

I understand assumption of risk to apply to normal and known risks of employment, not to unusual and special situations involving danger to the employee (perhaps not fully appreciated by the employee) situations created by the employer's suggestion, it might perhaps fairly be said—insistence.

For analogy suppose plaintiff's superior had directed him to go on a special mission to defendant's down-town office, and plaintiff had been injured while in the down-town office, due to some negligence on defendant's part in not maintaining

proper equipment in the office. Would plaintiff be deemed, as a matter of law, to have assumed the risk of such negligence? I think not.

The jury, by its verdict, found, as a matter of fact, that plaintiff did not assume the risks connected with the special mission of going to fix the car. [32]

As to defendants' other point, that plaintiff could not accept "compensation" for hospital and medical services, as he did, without extinguishing his entire claim, the Oregon cases seem to me to be against defendant. They indicate that a plaintiff can accept payments "on account." This was plaintiff's theory here. The plaintiff confessed payment for loss of services and payment of doctor and hospital bills. Making no claim for those items, he sued for the pain and suffering, and for the disability which he claimed resulted from the accident. This I think he could do.

CLAUDE McCOLLOCH,
Judge.

Portland, Oregon, March 10th, 1939.

[Endorsed]: Filed March 10, 1939. [33]

And afterwards, to wit, on the 31st day of May, 1939, there was duly filed in said Court, a Notice of Appeal in words and figures as follows, to wit: [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To James Ralph Hunt and George L. Rauch and Francis I. Smith, his attorneys:

Notice is hereby given that the Union Oil Company of California, above named defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and the whole thereof entered in this action on the 22nd day of December, 1938, and which judgment became final upon an order entered in this action on March 7, 1939, denying defendant's motion for a new trial and to set aside the judgment.

JAMES ARTHUR POWERS,
Attorney for appellant, Union Oil Company of California.
Address: 610 American Bank Building, Portland, Oregon.

[Endorsed]: Filed May 31, 1939. [35]

And afterwards, to wit, on the 7th day of June, 1939, there was duly filed in said Court, a Designation of contents of record on appeal, in words and figures as follows, to wit: [36]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant Union Oil Company does hereby designate the following portions of the record, pro-

ceedings, and evidence, to be contained in the record on appeal in the above entitled cause:

1. Plaintiff's 3rd Amended Complaint;

2. Defendants' Answer to 3rd Amended Complaint;

3. Pre-trial order formulating issues;

4. Verdict and judgment entered therein;

5. Defendants' joint motion for directed verdict and motion to set aside verdict and for new trial;

6. Order denying joint motion, showing date filed;

7. Memorandum opinion of Court, denying joint motion for new trial and for directed verdict;

8. Portions of the testimony of witnesses: James Ralph Hunt, Harry G. Hadfield, A. M. Russell, as set out in the condensed narrative statement of material evidence and material portion of exhibits; condensed statement of the issues; designation of points to be relied upon on appeal; motion for non-suit and order entered thereon during trial; Court's charge to the Jury and proceedings had in connection therewith including objections to instructions and failure to instruct; all of the foregoing under this number being contained in appellant's condensed narrative statement of material evidence and material portions of exhibits, and issues raised during trial and points designated on appeal;

9. Notice of Appeal.

JAMES ARTHUR POWERS,
Attorney for Defendant Appellant. Post Office Address: 610 American Bank Bldg., Portland, Oregon.

[Endorsed]: Filed June 7, 1939. [37]

And afterwards, to wit, on the 22nd day of August, 1939, there was duly filed in said Court, a Stipulated Narrative Statement of Evidence, in words and figures as follows, to wit: [38]

[Title of District Court and Cause.]

CONDENSED NARRATIVE STATEMENT OF MATERIAL EVIDENCE; MATERIAL PORTIONS OF EXHIBITS; ISSUES RAISED DURING TRIAL; AND POINTS DESIGNATED ON APPEAL.

JAMES RALPH HUNT

Plaintiff, a young man now about 25 years of age, entered the employ of the Union Service Stations, Inc., in August, 1933. Prior thereto he had various employments such as painter's helper, baker's helper, carried a newspaper route, etc. He was a high school graduate and had been active in athletics. When he entered the employment of the Union Service Stations, Inc., he first was given a two weeks training course where he was taught the

(Testimony of James Ralph Hunt.)

general work required of a filling station attendant. He then commenced work at a regular filling station as an assistant and gradually worked up to the position of first assistant and was in charge of the service station when he was there alone. On June 12, 1934, plaintiff, while working as a service station attendant for the Union Service Stations, Inc., and while using a tire iron in connection with the repairing of a tire, and exerting force with the tire iron which slipped, he fell forward and felt a sudden severe snap in the lower portion of his spine, which momentarily paralyzed him. He had never had any trouble with his back before and he could and did up until that time engage in strenuous athletics. [39]

(Transcript P. 6 Lines 24-25) "A. I played baseball every Sunday. Even after I went to work for the Union Oil Company I continued to play baseball in the evenings and on Sundays.

Q. What team did you play with?"

(T. P. 7 Lines 1 to 8) "A. I played with the Union Avenue Merchants.

Q. And what was your ambition, what were you working towards?

A. Well, I had had quite a bit of success in baseball, and the men that were in a position to help me along told me that if I would continue that I possibly would some day be a professional baseball player."

(Testimony of James Ralph Hunt.)

(T. 13) "Q. Will you describe to the jury how you were hurt in June 12th, 1934.

A. On the 12th day of June, 1934, a man came in with a tire to be repaired, and I was on duty at the time and I went to work on this tire. We had a long tire iron [40] there and a short tire iron, and I would take this short tire iron and hook it into the tire and take the large, slender tire iron, and the end of this tire iron was broken off at the time, and bring it into the tire and remove the—take a bit at a time to lift this tire up over the rim. Well, I put the large tire iron in and pried down on it, and as I pried on this tire iron the tire iron slipped and I fell forward, and at the time something snapped in my back just like it was an elastic band, I could hear it pop, and I fell down to the pavement and for two or three minutes, why I didn't have any use of my legs at all, they were paralyzed, and after I got the use of my legs I went into the station and I gave up all hopes of fixing this tire."

Plaintiff reported the matter to his employer who sent him to Dr. Simmons, a company doctor, for medical treatment.

(T. 15, 16) "Q. Who was Dr. Simmons?

A. Dr. Simmons was the company's medical doctor, general practitioner. And Dr. Simmons took and taped me up with adhesive tape. He

(Testimony of James Ralph Hunt.)

taped me from my hips to my shoulders, and he told me to wear that tape for three days and then to come back to him. Well, I returned to work, and for three days I worked and during this time, why the pain continued to get worse, and at the end of three days, why I went back to Dr. Simmons and Dr. Simmons asked me how I felt and I told him my back was no better, it was aching just as bad as it had been, and he suggested that he call Dr. Dillehunt. He did, and Dr. Dillehunt told me to come up to him; Dr. Dillehunt is the company's chief surgeon, and I went to see Dr. Dillehunt and he removed the tape from my body and examined my back, and I told him just what had happened and he said that—rather, he took a corset effect that he had there and put me in this corset with instructions that I was to wear this corset and not to do any heavy work of any kind or strain myself, and to wear that corset until they could make a brace proper for my back, and he sent me home and told me that I could return to work. I went back to work and I didn't do any hard work, just puttered around the station, put gas in the cars and check tires, and then went back after about the tenth day and got this new brace, and then he told me to wear this brace and return to work, with instructions that I was to do light, easy work. I went back to work, and then I did

(Testimony of James Ralph Hunt.)

this light work around there for a while. My back continued to bother me all the time. I couldn't lift anything heavy or strain myself, but as time went on, why the work increased at the station and I got in and I had to do my part of the work. I lubricated cars and I strained myself, and I repaired tires.

Q. Now, you say this back bothered you. Just what do you mean by that?

A. Well, it was a constant pain there. If I would strain myself the pain would go up from my back and it would ache, I would have to sit down and rest, and it made me irritable, and there was always a dull ache right between my hips." [41]

The back brace which plaintiff wore, fit up under his shoulders and extended down to his hips and supported his back in a rigid position. He was not comfortable without the brace and took it off only at times at night when he went to bed. Plaintiff continued to wear this brace and was wearing it on November 5, 1934, while working alone as attendant in charge of a filling station for the defendant Union Oil Company. The Union Oil Company had taken over all the assets and assumed all the liabilities of the Union Service Stations, Inc. The Union Oil Company had owned all the stock of the Union Service Stations, Inc., and certain property was absorbed by the Union Oil Company on July 1, 1934, the service station where plaintiff was

(Testimony of James Ralph Hunt.)

working being one of the properties which was taken over by the Union Oil Company and plaintiff continued along with his work at this same filling station but commencing July 1, 1934, was carried as an employee of the Union Oil Company instead of the Union Service Stations, Inc., which was on that day dissolved. On November 5, 1934, as referred to above, plaintiff, while working at said service station alone received a telephone call from some individual whom he could not identify by name, to come and change a flat tire. The car with the flat tire was located at a distance of about a mile and a half from the service station where plaintiff was working and was located only a few blocks from another Union Service Station, the plaintiff testified: [42]

(T. P. 81 Line 16 to P. 82 Line 16) R. Hunt

A. That is right, I worked with my brace on.

Q. About how often would you go out changing a tire?

A. Well, whenever the calls came in. It is hard to tell just exactly how often we went out.

Q. Well, just tell the jury your best recollection now about how often you would leave the station and change a tire.

A. Well, you would average one or two, maybe four tires a week, to go out to service on a customer's yard or out on the street in front of the station or down the street from the station, whenever the call happened to come in.

(Testimony of James Ralph Hunt.)

Q. Well now, when you got down to change this tire you said you used your own jack?

A. Yes, sir.

Q. Now, your own jack, was there anything wrong with it especially?

A. No, it had been working right along.

Q. And it was all right for your car, was it?

A. It worked on my car.

Q. What was wrong with it for this car?

A. There apparently wasn't anything, there shouldn't have been anything wrong with it for this car.

Q. Well, was there anything wrong with it for this car?

A. Well, when I used it and got the car jacked up the car slipped off the jack.

Q. It slipped off the jack. Now, you claim in your complaint here—— [43]

(T. P. 83 Line 1 to P. 92 Line 16.) R Hunt

A. A cold, rainy day.

Q. Well, when you got there did you talk with the man that called, or anything?

A. The man that called, I rang his apartment, and he had been on—he was drunk.

Q. He was what?

A. The man was drunk, he had been drunk for all that night.

Q. Drunk?

A. Yes, sir, and he said that is why he didn't change his own tire, and so then I called

(Testimony of James Ralph Hunt.)

him down and he went down to the car with me. He finally came downstairs with the keys.

Q. I see, and was he out there while the car fell on you?

A. Oh, he was standing around there for a while and then he went back in, and then he came back out.

Q. What was his name, do you know?

A. I don't know the man's name.

Q. Well, did you ask him to help you?

A. Well, he couldn't help me. He couldn't help himself, hardly.

Q. Well, when he telephoned you did he sound kind of——

A. Well, he sounded kind of funny over the phone, but you couldn't always tell the condition.

Q. Well, what did you do there? Just to kind of go over that a little bit, he gave you the keys, did he, to get the wheel off of the spare or how was it?

A. Well, he had a little lock gadget on the back end and he gave me the keys and I took the jack out of my car and got down on my hands and knees and slid back underneath this trunk rack affair under the car and put this jack under there.

Q. And you got right to work, so to speak?

A. Surely.

Q. And then did you jack the car up?

(Testimony of James Ralph Hunt.)

A. Then I proceeded to jack the car up.

Q. You got it up all right? [44]

A. I got it up.

Q. And then what happened?

A. Then I pushed myself back and got underneath the trunk rack end of it and started to raise myself up to get out, and this thing came down and struck me across the hips, and then for a few minutes I just laid there.

Q. The car fell off the jack? A. Yes.

Q. What did it land on, the wheel, the flat tire? A. It landed on the flat tire.

Q. Did you know it was going to fall?

A. No, I didn't know it was going to fall.

Q. It just fell? A. It just fell.

Q. Well now, you say that jack of yours was safe enough?

A. Well, I thought it was safe enough. I had used it before.

Q. It didn't have anything to do with it there; as far as your jack was concerned, you felt it was all right to use?

A. Yes, sir.

Q. Now, you complained in your complaint about not furnishing you with an able bodied assistant. What would you have had the able bodied assistant do if you had had one along with you?

(Testimony of James Ralph Hunt.)

A. Well, if I had had an assistant along with me he'd have got down there under the car and jacked it up.

Q. He would have got hit in the back then instead of you?

A. Well, he probably would have.

Q. Well, only one man works under a car anyway, isn't that a fact.

A. That is a fact.

Q. It wouldn't have taken both of you under there? A. No, but the——

Q. What is that? [45]

A. I didn't say anything.

Q. Well now, what was wrong with that jack as far as operating on this particular car was concerned?

A. It was a short handled jack. You had to climb back underneath the car and insert a small little handle into it and jack it up, and it had a flat top on the jack. It might have had a prong tip jack to clamp around that axle and hold it on.

Q. Couldn't you reach it from out in back?

A. No, sir.

Q. Well, why was it you couldn't reach it?

A. Well, understand my back is stiff all the time, and with that brace on there was no give. I had to be in straight position to work on the car.

Q. Well, as I understood you to say, the handle was too short?

(Testimony of James Ralph Hunt.)

A. Yes, this was a short handled jack.

Q. And you were complaining because it didn't have a longer handle there, one of those that fold up?

A. It could have had a folding up handle that extended out beyond the rear end.

Q. You say there were lots of those around? A. There was.

Q. And when did they come out?

A. Oh, they had been out quite a while.

Q. Did they come out when they had longer rear ends to cars?

A. Yes. Those cars were out in '29 and '30, back in there.

Q. But you didn't have that type with your car? A. No, sir.

Q. They came with the cars that had the trunks, the longer rear ends, as I understand it, is that correct?

A. That is right, and then you could have bought those jacks on the market. They were for sale.

Q. Well, there was nothing to keep you from taking the jack out of this car if your handle was not long enough and use the jack that was furnished in that car, was there? The man was there and you had his keys? [46]

A. His jack was broke. He told me his jack that he had was not any good. I asked him about the jack.

(Testimony of James Ralph Hunt.)

Q. Well now, I went over carefully with you just what took place there a while ago and you didn't mention it at that time. I asked you just what you did and you said you couldn't get any help from him, he was kind of drunk. A. He was.

Q. Did you look at his jack?

A. I looked into—I was in the front end of his car.

Q. You just kind of omitted to tell the jury that here before when I asked you to state everything you did and you said you went there and opened up that little lock that he gave you and then you got under and put your key or your jack under there and started jacking away. Now you say his jack was broken.

A. Well, he told me his jack was not workable.

Q. Did you ask him that over the phone?

A. No, sir.

Q. So you met a new situation when you got down where the car was that you didn't anticipate back at the station?

A. That is right.

Q. You planned you would use his jack?

A. I didn't plan anything.

Q. Well, you knew what kind of a car it was? A. That is right.

Q. You knew your jack handle was not long enough?

(Testimony of James Ralph Hunt.)

A. But I knew I could get down—I had been getting down and climbing underneath these cars before to jack them up.

Q. You had used your own jack?

A. Yes, sir.

Q. And that was good enough for you, was it?

A. It had to be, there wasn't anything else.

Q. Well, I mean you had been back there at that station and there was a long handled jack there, wasn't there?

A. Yes, sir. [47]

Mr. Powers: May we have that jack, please?

(A jack was thereupon brought into the court room.)

Q. Is that the jack or the type jack that was in use there at the station?

A. That is not the jack that was there at the station. However, it is a similar jack to it.

Q. One similar to it? A. Yes.

Q. And are these the tire irons?

A. No, sir.

Q. Not like them at all?

A. Those are not like the tire irons.

Q. Well, now, the other jack—this is called a Weaver jack. That is the same make, was it, that they had there at the station?

A. Yes, sir.

Q. But you say this isn't the same jack?

A. No.

(Testimony of James Ralph Hunt.)

Mr. Powers: They have already been marked and agreed upon there at the pre-trial. We will just offer them in evidence at this time.

The Court: They are admitted.

(The tire irons and jack so offered and received, were thereupon marked received as Defendants' Exhibits 6, 7, and 8.)

Mr. Powers: Q. It was a jack that looked like this, but not this jack? A. Yes.

Q. And how do you know that? How do you know this isn't the same jack?

A. Well, the reason I know it isn't is because when I was at Thirteenth and Broadway Ted McGrath, the manager there, went over to Station 73 and took the jack out.

Q. And about what month would that be?

A. Well, I imagine it was along in the latter part of '36—'35, rather.

Q. Along in the fall there some time of '35?

A Around the holiday season. [48]

Q. It was after you went back to work there at Thirteenth and Broadway?

A. That is right.

Q. They just changed jacks there, you think? A. Yes, sir.

Q. Now, with this jack you don't have to get under a car? A. No.

(Testimony of James Ralph Hunt.)

Q. Well, let's see, before you went down there you had been alone at the station, you said? A. Yes, I had.

Q. For how long a period?

A. Oh, I had been alone there for from about one o'clock until approximately twenty minutes after two or twenty minutes to three, when Snell came around.

Q. During that time you were in charge of the station? A. Yes, sir.

Q. Now, when this call came in there was a closer station, Union Oil Station, to the place where the tire was to be fixed, isn't that true?

A. Yes, sir.

Q. And was there anything to keep you from calling that other station and have someone over there or call some station where they had some extra men if you wanted a man to go down there and get it changed?

A. Well, there were several reasons why we didn't do that. We want the business in our station; this was our customer. At that time there was a quota system on the work that we did, and all service work counted in this system and we naturally wanted the work for ourselves.

Q. But if you had been there alone like you were you could have called that other station and had someone else go over there, couldn't you, and fix that tire?

(Testimony of James Ralph Hunt.)

A. I could have, yes.

Q. Well, I mean it was more or less up to you, you were there in charge and you were there alone at the time the call came in, you had to decide yourself whether you would call up there? [49]

A. Well, it was getting around at the time I knew very shortly when someone would be back and we could do the work ourselves and he was willing to wait.

Q. Well, the reason you didn't call up anybody else was because of that quota system, you wanted that business yourself?

A. That is right. He was our customer and we wanted to take care of him ourselves. You remember he was pretty close to that station and if they had serviced his car we'd have probably lost the customer.

Q. And you would have lost something by that, wouldn't you?

A. We would have lost his business.

Q. Yes, but I mean you had some quota system there you were working on?

A. That is right.

Q. So you didn't ask anybody to furnish you with any able bodied assistant then at that time?

A. I asked Mr. Snell to do the work. I didn't have anyone to ask to furnish me with one.

(Testimony of James Ralph Hunt.)

Q. Yes. Well, Mr. Snell wasn't even on duty yet?

A. No, but he was there, he could have easily gone.

Q. But he didn't go to work until three, did he?

A. That is all right, it is not out of the ordinary to go to work sometimes before you are due on duty. If you would come around the station early you would go to work early.

Q. Well, if he had been there earlier when you were in charge you could have told him what to have done, but he hadn't come to work yet?

A. I didn't have any authority over Mr. Snell.

Q. But you were in charge there?

A. Yes, but he didn't have to take orders from me.

Q. Well, if you were left in charge he would have?

A. It was not understood that I was to give orders there.

Q. No, but you were in full charge when you were there alone?

A. When I was alone, surely. [50]

Plaintiff left the station in charge of Snell, another employee who was scheduled to come on duty shortly thereafter. Plaintiff drove his own car in going to the place where the tire was to be changed.

(Testimony of James Ralph Hunt.)

There was a four-wheel jack with a long handle on it, known as a Weaver Jack, at the service station, which jack permitted a car to be raised without crawling under it. Plaintiff did not take this jack with him as it was too heavy for him to manage. He testified that if an able-bodied man had put the jack in his car, he would not have been able to take it out alone when he got to the place where the tire was to be changed.

(T. 20, 21) "A. It was a cold day, a cold rain, and this call came in and at the time I was there alone. Shortly after this the relief came on, at approximately twenty minutes to three, and he said that he would watch the station while I went out to repair this flat tire. Now, I went down to—got into my car and drove down to repair this tire. When I got there the car was down and the right rear tire was flat, and I took my jack out of my car, which was a typical little Ford jack.

Q. Now, just a minute. What jack, if any, did the company provide for you to do that work?

A. Well, at that time the company didn't provide any jack that we could take out on a service call.

Q. What kind of a jack did they provide, if any?

Q. On the station lot there was a large, heavy jack there of the type that rolls on four

(Testimony of James Ralph Hunt.)

wheels that you could pull around with a large extension handle on it, and this jack was too heavy, I couldn't have lifted it, taken it out on the call; and if I got—if someone could have put it in I could never have gotten it out of my car. Also this jack, we didn't use it whenever possible because it had a habit of slipping, and when you get the car up you couldn't always get it down. You have to shake and jiggle the handle to get that jack to lower, and so I went on to this job with my own jack.

Q. Now, what kind of a jack was that?

A. My jack was a regular Ford jack. It was the regular Ford equipment that came in a Model "A" Ford.

Q. Now, just explain to the jury how it operated.

A. This was a regular model—practically a Model "T" jack. It worked on the ratchet type. You jacked it up and it would go up one notch at a time to raise your car to the proper level.

Q. Now, in order to use that jack where did you have to be?

A. Well, in order to use that jack you would have to crawl back under the car and place it under the axle. This particular car was a '30 Plymouth sedan. It was a low car, and on the back there was a trunk rack, and the trunk resting on this rack. Now, in order to place this jack under the rear axle——

(Testimony of James Ralph Hunt.)

Q. Just let me interrupt you a minute. I want to ask you more about the jack. Was that the only form of jack that was available in the community at that time?'' [51]

* * * * * * *

(T. 21 to 24) R. Hunt

A. No. At that time there was a screw type jack that worked on the order of a telescope.

Q. Were those general or scarce at that time?

A. They were a general jack; they were quite common, and this particular jack you place under the car and it had an extension handle that would extend out practically any length you wanted to extend it, and you could stand back and twist this handle and raise your jack.

Q. Was that equipped in any way to prevent it from slipping from the axle, or whatever you placed it against?

A. The screw type jack had—on the jaw of the jack it had sort of prongs that would fit up around the axle to keep the axle of the car from slipping off the jack.

Q. Now, in operating them with an extension handle can you state whether or not it is necessary to be under the car?

A. No, it was not necessary.

Q. And can you explain to the jury the difference between those two forms of jacks?

(Testimony of James Ralph Hunt.)

A. Well, the short Ford jack that I was using was a very frail jack. It had a flat platform on the back of the jack. You had to crawl under the car and place it under the axle and place in a little hand lever, and it went up a notch at a time, and the other jack, the screw type jack, was made on the order of the telescope jack. You would put the jack under the car and then the extension handle would extend beyond the rear of the car. You would twist this handle and the jack would raise. It would go up a certain part and then another section would come out and it would go up until you raised the car to the proper level.

Q. Now, you have stated that one of those tires was flat on this car. What kind of a car did you say it was?

A. It was a '30—it was either a '30 or a '31 Plymouth sedan. It was that series, it was the same type car.

Q. And how are they built with respect to their rear?

A. Well, the rear of the car sits down quite low.

Q. With respect to the axle itself?

A. That car with the tire uninflated, it is down within ten inches of the ground, the axle is. [52]

(T. P. 21 Line 16 to P. 34 Line 12) R. Hunt

Q. That is, when the tire was deflated?

A. When the tire was deflated.

(Testimony of James Ralph Hunt.)

Q. Was the tire deflated when you arrived there? A. Yes, it was.

Q. Which one?

A. The right rear tire was flat.

Q. And where is the end of that type of car with respect to the axle, do you remember?

A. Well, the end is approximately, oh, I would say around six inches below—it drops about six inches below the axle.

Q. I am talking about the distance from the axle, its transverse position in the car to the end of the car.

A. Oh, it must have been in, oh, probably a yard from the end of the car.

Q. Then I believe you stated there was something else attached to that car. Was there something attached to the car?

A. And to the end of the car there was a trunk rack that extended, oh, another yard, practically a yard out beyond the end of the car, and on this trunk rack there was a trunk that set on top of the—that set on the back end of the car.

Q. Now how much clearance was there, if you remember, between the bottom parts of that car and the pavement?

A. Well, between the bottom——

Q. With the tire deflated.

(Testimony of James Ralph Hunt.)

A. With the tire deflated, between the bottom of the car and the pavement would be approximately, oh, six inches clearance.

Q. Six inches?

A. Around six inches.

Q. And when it was inflated was there a difference?

A. When it was inflated, why the distance between—well, I know between the axle and the ground was around thirteen or thirteen and a half inches.

Q. And do you know whether or not that carried out the same way to the rear? [53]

A. It carried out practically the same to the rear end.

Q. Then how much space did you have to crawl under, if you crowled under there?

A. Well, in the rear, under the rear end of the car I had practically between six and eight inches to get under that car.

Q. And then just state what you did.

A. Then after I got under there I took this small Ford jack and jacked the car up to a height of practically, oh, another six inches, high enough to get the flat tire off of the ground so that I could remove the tire, and after I got this car up to the proper height, then I backed out; I had to back out, and as I got back underneath the hoist—not the hoist, but the rack on it, I had to elevate and hoist my

(Testimony of James Ralph Hunt.)

hips up, and as I did, why the car slipped and came down and struck me across the back. For a few minutes I don't remember what happened, everything went black, and when I regained my consciousness the first thing I was aware of was the pain in my back around where I had been—below this brace. Up until the time I had this brace—just below the center part of this brace and in the lower part of my back there was a sharp pain there and I didn't have the use of my legs, they would hardly move, and I laid there for a time and finally shoved myself out from under the car. I got up to my feet——

Q. Now, may I ask this: Did you have the brace on at that time?

A. I had the brace on at that time. I wore the brace all the time.

Q. Now, was that during the time when you were doing less than full work?

A. At the time when I was doing less than full work, you say?

Q. Yes. Were you doing all the work that was to be done about the station at that time?

A. I was doing all the work that was to be done about the station at that time.

Q. Were you lifting heavy tires?

A. I was lifting tires and changing tires and working on them.

Q. And wearing this brace?

(Testimony of James Ralph Hunt.)

A. Wearing the brace at all times. [54]

Q. Well now, state how you were—just what steps would you have gone through to have taken that tire at that time had you not had the accident?

A. Well, if I had gotten the tire off of the wheel, when I got it off, why I would have rolled it over to my car and opened the door and rolled it up against the fender—not the fender, but the running board of the car, and braced it, lifted it up and rolled it right in there, take the back end of it and just push it up over the running board and roll it into the front seat. That is where I had to carry all the tires or anything that I had to carry, was in the front seat.

Q. Could you lift that tire at that time?

A. No, I couldn't.

Q. What did you do in your regular work when you had something like that to do?

A. Well, when I had something that was too heavy, if I had to bend down, I couldn't bend down, I would squat down to lift it up, and if anything was beyond my means of lifting, if I couldn't lift it at all, why I would have to have help to do that.

Q. Is that the way you were doing your work at that time?

A. At that time, changing tires and things, I could do by myself.

(Testimony of James Ralph Hunt.)

Q. Now, at this time, as I understand it, you found yourself under the car, and were you having any trouble in moving your legs?

A. Yes, my legs couldn't move. I could get very little action out of my legs, and there was this pain in the lower part of my back. Finally I got to move my legs around and I took my hands and shoved myself out beyond the end of this car and got myself on my feet, and I realized then that I couldn't change the tire, so I got into my car and started it up and had an awful time driving it because this pain was getting worse all the time. It ached, and there was a sort of numbness in my legs, and I drove the car approximately four blocks to the next Union station down on Union Avenue and Oregon street, and I drove in there and the boy in attendance, his name was Everett Keith, and I told him what had happened, that the car had fell down and struck me across the hips and that my back was aching and that I didn't have very good use of my legs, and I——

(An objection was here interposed; objection sustained.)

Mr. Rauch: Q. All right, you don't need to tell what you told him. [55]

Just state what was done.

A. So, well, I slid over—when I got there I knew I couldn't drive the car back, so I got

(Testimony of James Ralph Hunt.)

on the other side of the car and Everett Keith drove the car back up to the other man's car, the one with the flat tire.

Q. Where was that place?

A. It was on First and Williams avenue.

Q. That is where the car that had the flat tire was?

A. That is where the car that had the flat tire was.

Q. And you got the man to help you from what place?

A. From Union and Oregon, the Union service station on Union avenue and Oregon.

Q. Could you state how far that was away?

A. It was approximately five blocks from First and Williams avenue.

A. Well, state what happened there. Did you get him to go? Who drove the car?

A. He went with me. My back was aching so bad I knew I couldn't drive, so I slid over and he got in and drove the car back to Union avenue and First. When we got there I stayed in the car because I didn't feel like getting out, and he got out and crawled under the car and jacked it up and changed the tire, and after he got the tire off, why he threw his tire into the back end of my car and climbed in and drove me back to my station at Union avenue and Fargo street.

Q. What did you do then?

(Testimony of James Ralph Hunt.)

A. When I got up there, why the manager, Herman Timmer, was there, and the relief man——

Q. Who was that?

A. Herman Timmer, the manager, was at the station, and the relief man, Peter Snell.

Q. Who was Mr. Timmer as far as you were concerned?

A. Well, Mr. Timmer, as far as I was concerned, he was my boss in the service station; he was the manager of the station.

Q. Was he there when you left?

A. No, he was not there when I left. When I returned he was there and he wanted to know what happened. He asked Keith what he was doing with me and he explained to Timmer that the car had fallen down and struck me across the hips, and also explained to Mr. Snell what had happened. The boy Keith that drove me up there got out of the car, and during this time, why the pain in my back got [56] so bad that I didn't want to stay around there any longer, and I told them I would go home. So I managed to get the car rolling and drove practically a mile home. When I got home I drove up in front of the house and got out of the car. I pulled my legs around and got out on the edge of the curb, and I had to rest for a while and finally got up as far as the front door and rattled the door and my wife

(Testimony of James Ralph Hunt.)

came to the door and let me in, helped me into the room and eased me down to the davenport and took my shoes and stockings off and asked me what happened, and I tried to explain to her, but during this time I didn't feel like talking, there was constant pain, and so I told her she had better call Dr. Dillehunt, and she called Dr. Dillehunt and told him that I had been hurt and he said for us to come right down to the office.

Q. Did you tell her that you had had an accident? Were you able to tell her that?

A. I told my wife that a car had fallen on me, I had hurt my back. Other than that I didn't tell her much more.

Q. Did you hear her call Dr. Dillehunt?

A. Yes, I did.

Q. Do you know what she told him?

A. She told Dr. Dillehunt that I had hurt my back and that a car had fallen on me, and he said for us to come right down to the office.

Q. And did you go?

A. And then the wife got my shoes and socks back on me and put a heavy coat around me, because during this time I was having chills, my back was aching, and then she helped me out to the car and drove me from our house down—we lived on Missouri and Mason at the time, and she drove me from there down to the Medical Arts Building.

(Testimony of James Ralph Hunt.)

Q. Now, what I ask with regard as to what day it was, regardless of whether it was October or November, can you state whether or not that was the same day you were hurt?

A. That was the same day I was hurt.

Q. The same day the car fell, I mean.

A. The same day the car fell on me, it was that afternoon.

Q. And you went to Dr. Dillehunt's office?

A. I went to Dr. Dillehunt's office.

Q. Go ahead and state what happened.

A. We got down town and the wife helped me out of the car and braced me while I walked down the street into [57] the office. We got into Dr. Dillehunt's office, and by that time I hardly had any use of my legs at all and the pain was getting worse, and he looked at me and he said, "Well, I can't do anything for you now", and he asked me what had happened and I explained to him that this car had fallen and struck me across the hips and that I didn't have any use of my legs hardly at all, and he said, "Well, you had better go back home and go to bed and stay in bed for five days and return then", and so the wife took me home and when we got home, why she helped me upstairs and undressed me and took the brace off of my back and put me to bed.

Q. I want to ask you, was your wife there when you told Dr. Dillehunt that a car had fallen on you? A. Yes, she was.

(Testimony of James Ralph Hunt.)

Q. And you told him that?

A. I told him myself.

Q. Just tell the jury then what happened when you told him that.

A. Well, Dr. Dill——

Mr. Powers: He has just gone over it once. He has covered that.

Mr. Rauch: Q. My question is, what happened in the office when you told Dr. Dillehunt that the car had fallen on your back? Now, just a minute. The Court may wish——

The Court: Go ahead.

A. Well, Dr. Dillehunt looked at me, and I was in such pain he didn't say anything. He saw how I was suffering, and he said, "You go home", he said, "I can't do anything for you". He said, "The condition you are in, you go home and go to bed and stay in bed for five days". So the wife took me home and undressed me, took this brace off and got me into bed. Well, after I got to bed I laid there on my back for five days, and during that time, well, when I wanted to move or to get any comfort at all she had to turn me on my side and brace me up with pillows. I didn't have strength enough, and my legs wouldn't move the first three or four days. I didn't have hardly any movement at all in my legs to twist my body, and she would come and roll me from side to side and brace me up with pillows.

(Testimony of James Ralph Hunt.)

Mr. Rauch: Q. A little louder, please, Mr. Hunt.

A. And this continued. She fed me in bed, and she had to take care of me. I couldn't get up to go to the lavatory. And at the end of the fifth day, why she dressed me and took me back to Dr. Dillehunt's office. Prior to this, why after I got home that afternoon, why the wife had to call Mr. Russell and report that I couldn't go to work because I had hurt my back, the [58] car had fallen on me; rather, she told him that I had hurt myself, and he came to the house.

Q. When did he come?

A. Oh, I think it was the next afternoon he came out to our house, or that evening.

Q. Did you talk to him about that?

A. And I talked to Mr. Russell and explained to him just what had happened to me, that I had jacked this car up and it had fallen down and struck me across the hips.

Q. Is Mr. Russell here?

A. Mr. Russell is here.

Q. Which gentleman is he?

A. The gentleman at this table (indicating). Then that is the last time I saw Mr. Russell. Then on the fifth day my wife dressed me and took me back to Dr. Dillehunt's office. We went up to his office and he took me up to a little room and set me on the edge of a little

(Testimony of James Ralph Hunt.)

regular operating table, and at that time he removed my brace and examined me and tested my knees for reflexes and pulled my legs and bent my back both forward and backwards and held a general examination, and after that a visiting surgeon from New York City came in and did the same thing, went through the same examination, and also Dr. Lucas, Dr. Dillehunt's associate, performed practically the same examination. Well, after that——

Q. How did that make you feel?

A. Well, I didn't know what to think. They didn't say anything, they just kept examining me during this——

Q. Could you sense their motions?

A. Well, I knew there was something wrong because they wouldn't comment, and Dr. Dillehunt usually would talk all the time he was in there and tell me just what——

Q. Did these movements have any effect on you? What was the effects of these movements on you?

A. Well, when they would bring my legs backwards or bend me backwards or forwards there was always a pain there that pained continuously.

Q. Did these pains or these movements increase or decrease the pain?

A. These movements increased the pain. After these three examinations, why Dr. Dille-

(Testimony of James Ralph Hunt.)

hunt came in and told me that I would have to have an operation. He turned to my wife, he always called my wife "Ma", and he says, "Well, Ma," he says, "we are going to have to operate on him." [59]

* * * * * * *

(T. P. 35 Line 11 to T. P. 36 Line 14) R. Hunt

A. And so Dr. Dillehunt said, "This operation will probably take effect immediately as soon as I get—within a short while". He says, "Will you be ready?" And I said, "Yes", and with that I returned home, continuing to wear this brace with the instructions that I was not to do any work at all, just to take it easy, and spent approximately two or three days around home doing nothing, and after a short while my legs began to feel better, they bothered me less, and if I would strain myself or drive too much or exert myself I would get—the pain would increase right along. I went down to the company office and Mr. Russell told me that if I wanted to I could come down there and work an hour or two, fuss around at the office, or if I didn't want to work I didn't have to. So some days I would go down there and I would work an hour or so and then go home. If it was much longer than an hour, why the pain would get so bad that I couldn't stand up or sit down either, so I would go home and lay down and rest. Well, that continued for about

(Testimony of James Ralph Hunt.)

two weeks, and then I would stretch it along until I got so I was staying two and three hours a day, and during this time, why——

Q. Will you state whether or not you were wearing the brace at this time?

A. I was wearing the brace at all times, and I would go out and get credit card applications and I would run errands and help him around the office, and during this time I was on full time payments. Mr. Russell says, "We don't want to report this as loss time accident"——

Q. How is that?

A. Mr. Russell stated he didn't want to state this as a loss time accident.

* * * * * * *

(T. P. 36 Line 23 to T. P. 37 Line 1)

Mr. Rauch: Q. Did you continue to work for the company then?

A. Yes, I continued to work.

Q. Was there any deductions from your pay? A. No deductions from my pay.

* * * * * * *

(T. P. 38 Line 13 to T. P. 40 Line 8)

Q. Now, we will go back to the time when you were working following the accident and wearing the brace, as I understand was your last testimony about that, and what kind of work were you doing?

(Testimony of James Ralph Hunt.)

A. Well, I was doing light work around the office.

Q. When you worked around the office, that is what I mean, what did you do?

A. I went out and secured credit card applications. The company was getting some new leases at that time to build service stations, and I took leases around [60] on several occasions and had them signed, and I also helped Mr. Russell around the office. If he had any communications to carry out to the boys around the service stations I did that, and odd jobs, whatever he would instruct me to do. Also——

Q. Yes, and how long did you continue that?

A. Well, I continued that from shortly after I was hurt up until the 28th day of February, 1935.

Q. What happened then?

A. On the 28th day of February, 1935, I received instructions that I was to go to the hospital for an operation, which I did, and on the 1st day of March, 1935, they operated on me.

Q. And now how did you come to have that operation? How did you come to go to the hospital for that operation? How did you come to go to the hospital for the operation?

(Testimony of James Ralph Hunt.)

A. Well, as a result of this car falling on me.

Q. No, I don't mean that. Did anyone bring that to your attention?

A. Well, Dr. Dillehunt told me to go to the hospital on the 28th day of February.

Q. And you went?

A. And I went at his instructions, yes.

Q. Who went with you?

A. Well, nobody went to the hospital with me. He just told me to go up there. My wife went up there with me that night.

Q. Did you go alone?

A. My wife went with me.

Q. Your wife went with you?

A. Yes.

Q. On the night of the 28th of February?

A. On the night of the 28th of February.

Q. And did they operate on you?

A. They operated on me on the morning of the first of March.

Q. And state what you next remember.

A. Well, I remember that morning they took me up to the operating room. They went through the usual procedure. [61] They shaved me and got me ready for the operation and got up there and Dr. Dillehunt laid me flat on my stomach, and that is the last I know.

(Testimony of James Ralph Hunt.)

(Second Supplemental T. P. 3 Line 1 to S. S. T. P. 9 Line 25)

Q. What next did you know?

A. And the next thing I knew was about two days later before I was conscious enough to know what was taking place, and I woke up with a—the first thing I noticed was a dull pain right down in my back, and I felt I was just as stiff as a board. I couldn't move anything but my head and my arms, and I could wiggle the end of my toes. Well, as soon as I began to notice things I noticed I was quite high up in the air, because I was in a two-bed room and the bed next to me looked like it was practically three or four feet below my bed, and I found that I was up on an iron frame resting on blocks of wood on top of the original hospital bed, and over this frame there was canvas stretched, and on top of that canvas there was boards laying and then I was resting on top of this, and I was bound tight, I couldn't move anything, just my toes and my head and my arms, and it was about the third day when I noticed all this.

Q. Can you state what happened and how it affected you and how you felt from then on?

A. Well, from then on for the first day—later I heard the first day that I didn't regain consciousness enough, that they fed me through intravenous and the nurse would feed

(Testimony of James Ralph Hunt.)

me every day. I couldn't move anything with this constant pain in my back, and they serviced me in every way. The nurse would feed me and bathe me and at times, why I would just lay there and sort of drift off; I didn't have any memory of anything.

Q. Did you have the brace on then?

A. No, there was no brace on me at the time. Around my body—around the incision there was regular packing and tape, and then around this was large adhesive tape over these bandages, and then they had me wrapped in a large canvas wrapper, and this thing was tied to me with strings and also large safety pins. This wrapper or binder extended from my hips up under my arm-pits.

Q. Was that binder tight or loose?

A. That binder was just as tight as they could pull it.

Q. And was there any way of maintaining you on the bed?

A. Well, the only way they could keep me on the bed was they had me fastened down with the sheets to the bed in a straight position flat on my back. There was no movement at all, either sideways or in any other position.

Q. Did you attempt to move at that time?

[62]

(Testimony of James Ralph Hunt.)

A. No, I couldn't move. I didn't have any feeling at all in my body. It was numb; like I say, all I could wiggle was my toes, turn my head and lift my arms, and I laid there on this rack for, well, practically three weeks. During that time I never moved an inch, and after three weeks' time, why the nurses—the doctor came in one morning and gave the nurse permission to slip pillows back under one side of me to sort of lift that off of the bed to ease the pain, and so that continued for two or three days. They would put it on one side and then they would put the pillows on the other side, and this lessened the pain quite a bit. It took some of the soreness out of my back, and at the end of the fourth week, why Dr. Dillehunt came down one morning and said he was taking me back to the surgery, and they rolled me up to the surgery that morning. He took off all this wrapping and the bandaging and told me he was going to put me in a cast. Well, when he got into his work and inspected the operation, there seemed to be some sort of an arthritic condition there and he told me that he couldn't put me into a cast. He put me back into this binder and took me back downstairs. They placed me back on the frame and then I laid on that frame for another two weeks, during that time moving just as the nurses would pry my body up and put pillows underneath

(Testimony of James Ralph Hunt.)

me, and the pain never lessened, it was the same all the time; it was a constant dull pain down in my back.

Q. How long did you stay in the hospital?

A. I was in the hospital practically six or seven weeks.

Q. Well, what if anything was done toward getting you out of there, if you know?

A. Well, toward getting me out of there, just the usual procedure of taking care of me. The doctors finally, after the fourth week, they took me off of this frame and put me into a bed, and this bed was in a sort of an inclining position, and they had boards under this bed and I would lay there on these mattresses, on the mattress which was on top of the boards, and I still had this binder around me, my body was stiff, and I just lay there with nothing but my thoughts about the condition I was in and how I felt and wondering if I would ever walk again, and the doctors didn't seem to give you —they wouldn't give you much hope on how you was feeling or how you were going to come out of it. You just laid there and think——

Q. What effect did that have on you in your mind?

A. Well, I wondered about my family; I had a wife and a young baby and I was wondering if I was going to be able to support them again, and also I thought of my baseball future,

(Testimony of James Ralph Hunt.)

I knew that was gone. I thought so, anyway. I couldn't——

Mr. Powers: I don't think that is proper, your [63] Honor. He can tell what happened to him but what he was speculating about at that time—the question is what are the facts, what did occur and what the result was obtaining there. I don't think it helps the jury, what he was wondering about. The question is how he got along and whether he got a good operation and a good result.

The Court: I think it is proper under the allegation of mental anguish. Go ahead.

Mr. Rauch: Q. Go ahead, the Judge said.

A. Well, these thoughts would naturally go through your mind, and I would lay there and think of that from day to day. That is all I had to think of in my condition, and count the flies on the ceiling, was just to lay there and think of these things. So after about a week on this bed the nurse came in one morning—rather, the doctor told me the day before, "Tomorrow", he says, "we are going to try and see if you can walk." Well, in the meantime the doctor's man had come from his office and measured me for a new brace, and this new type, they brought it around on the day that I was supposed to walk, and he got me into position and put this brace on me. This brace consisted of a big iron band

(Testimony of James Ralph Hunt.)

right around my hips, and there was two iron bars ran up the sides of it, and on top of this brace there were stirrups and they held you under the arms and just kept you just like this in a straight, rigid position, and from the bottom of the brace there was rubber tubes that ran down through your crotch and held this brace in place. Well, they put that on me that morning and the nurse set me up on the edge of the bed and the whole room just went blank, everything went around and around, and she kept me there for a few minutes and I realized that I couldn't get my sense of equilibrium, so they laid me back on the bed and said, "You can try it the next day". Well, the next day they came in and tried the same thing. Well, they continued that for a few days and about the third day things got so they cleared up and I sat up. Then two nurses held me on each side and held me up off the bed and put my feet on the floor. Well, I didn't have any strength and I couldn't move my legs, there was that needle-like feeling going up through your limbs, and so she put me back in bed again and the next day they tried it. Well, after three or four more days of that procedure I finally got so with the help of two nurses they could walk me down the hall.

(Testimony of James Ralph Hunt.)

Q. What was the effect on you of that effort to walk, besides the tingling feeling, if any?

A. I didn't hear you, Mr. Rauch.

Q. What was the effect on you, that first attempt to walk, besides the tingling feeling in your legs, if anything? [64]

A. Well, my legs not only tingled, but I didn't have any strength in my legs, they just crumpled up, and if the nurses hadn't held me I would have fallen, and also right up through my back there was just a stiff feeling, I felt just like it was just solid just like that (demonstrating). I couldn't move at all. Without the help of these nurses I couldn't have stayed on my feet.

Q. Did it affect your head in any way?

A. Well, there was that dizzy, reeling feeling that you get when they take you out of bed. Every morning I had that. As soon as they put me on my feet, why the room would go round and round for a while and then it would just sort of clear up.

Q. Well, did they continue that treatment?

A. They continued that treatment and tried to exercise me until practically after two weeks of this I got so I could walk up and down the hall.

Q. And then what happened?

A. Then the doctor gave permission for them to take me home, and instructed me to re-

(Testimony of James Ralph Hunt.)

main in this brace, wear the brace at all times. Well, the first day they took me home I returned to my father's place and they put me right in bed. The wife had to fix in the same manner my hospital cot had been with boards under the mattress, and they put me to bed with this brace on. Well, the sudden change from the hospital to home, everything irritated me, the children running around there and the noise and things and I was irritable and restless for quite a while, and I would get up and maybe in a day I would exercise for a half hour to an hour. The wife would walk me around the house and exercise me and wait on me all the time. She would dress me and take care of all my wants, and I did that for quite a few days until I got strength enough so that I could stay up from an hour to two hours, and just rested around the house.

Q. Go ahead. What happened after that?

A. Well, this continued until the doctor finally gave me permission to leave the house and to go out and walk around the streets, and I would do that for three or four hours a day, and during this time, why I would go down to Dr. Dillehunt's office and he would turn me over to his nurse, who would exercise me, bend my legs and put heat and light treatments on my back, and I continued with these treatments

(Testimony of James Ralph Hunt.)

up until the latter part of July, at which time Dr. Dillehunt told me to return to work. [65]

(T. P. 41 Line 17 to P. 43 Line 22) R. Hunt

Well, when I went into the partnership it was understood that I would do the selling of the station and no heavy work. I was not to change tires or to strain myself in any way, and I went into the partnership with that understanding, and I continued to work with him until the first of—practically the first of February in 1938, at which time the Union Oil Company took the station back.

Q. Well, was there part of the work you could do?

A. There was part of the work I could do, anything on the hoist that was raised up so I could stand up and work on it; I could grease cars and I could squat down beside a car and put air in tires, and I could always put gas in cars and wash windshields, and if anyone would come in and buy anything, why I could stand there and talk to them and do most of the selling.

Q. Could you bend down from your hips?

A. I had no movement from my hips to speak of at all.

Q. Will you please stand. Now, do you get out of your chair any differently than you did before that operation or before the first injury?

(Testimony of James Ralph Hunt.)

A. Yes, I do.

Q. How?

A. When I sit down now I've got to brace myself and ease myself down into the chair.

Q. Do you use your arms, or not?

A. I use my arms and lower myself into the chair. Prior to this, why I could just get up like the average person does.

Q. And now will you please stand again. Now, suppose you want to pick something off of the floor?

A. Well, if I want to pick something off of the floor I've got to get alongside of it and bend down in this manner here (indicating) and pick it up.

Q. Will you please face the jury and show them just how far you can bend forward.

A. That is as far forward as I can bend (demonstrating).

Q. Now will you show them how far you can bend backward.

A. I can bend backward just like that, is as far as I can go backward (demonstrating).

Q. Has that been the condition since you were operated on? [66]

A. That has been the condition since I was operated on.

Q. You may sit down. Do you have any sense of pain different than you had before the operation or before the injury?

A. Well now, heavy—changes in weather,

(Testimony of James Ralph Hunt.)

sudden changes in weather just stiffen my back just like a board. If they open this window and if the cold air rushes in, or as the weather changes suddenly, if it is cold or if it is going to rain, why there is a stiffness or soreness in my back and it just gets stiff.

Q. State whether or not there is any pain in change of weather.

A. There is pain then in the lower part of my body, there is a constant pain.

Q. Can you state whether or not this has any effect on your work that you do?

A. Well, in the work I do I am limited, I can't strain myself, and if I am on my feet too much or if I work too long I become nervous and irritable.

Cross Examination

(T. P. 55 Line 14 to Line 18)

Q. Yes. Wouldn't you? Didn't you change a tire there and take it off?

A. I would change a tire—I would take the wheel off the car, but I wouldn't change the tire. I wouldn't take the tire off the rim, no sir.

* * * * * * *

Cross Examination

(T. P. 56 Line 25 to P. 57 Line 19)

Q. Well now, that work that you do for the American Tobacco Company, that requires you to sit around in a truck and drive a truck all over the country, doesn't it?

(Testimony of James Ralph Hunt.)

A. No, it does not.

Q. Well, just what do you have to do there, will you tell the jury, please?

A. In my work for the American Tobacco Company I am in special sales promotion work, and the company furnishes me with a car and I drive—I never drive over maybe a period of a mile or two miles at a time, and then get out and call on stores that are in that vicinity and get in and drive to the next store. That is all the driving I do, all the sitting I do, and in between times I walk into these stores; I carry about five cartons of cigarettes along with me, a carton of sample cigarettes, and go into the store and give the dealers quality talks on our merchandise and suggest new ways for them to display their merchandise and increase their sales, and try to introduce a new brand if we have a new brand at the time, try to introduce this brand and then talk to the consumers in the store, which indirect selling is the only means of promoting the sale of tobacco. [67]

(T. P. 59 Line 25 to P. 60 Line 4) R. Hunt

A. Well, during the winter time while I was working in the service station I usually lost two or three weeks, sometimes a month, during the cold weather.

Q. You got your pay all the time?

A. Well, certainly I did, I was a partner in the business.

(Testimony of James Ralph Hunt.)

(T. P. 60 Line 8 to Line 19)

Q. You never lost any pay at all. Well now, your back is in good enough condition to enable you to travel around that territory in that little truck down there, isn't it?

A. Well, it is because I make it. I do the work to suit myself. If I want to make four calls a day, I make four calls; if I want to make eight calls, I make eight calls.

Q. But I mean you feel you are well enough to do that kind of work?

A. Certainly, because it doesn't requre any strain or effort.

Q. Except driving those distances?

A. Yes, and I never drive over maybe ten or twenty miles at a time.

(S. S. T. P. 23 Line 1 to P. 24 Line 8)

ERNEST H. COATS

was thereupon produced as a witness in behalf of the plaintiff, and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rauch:

The Clerk: State your full name, please.

A. Ernest H. Coats.

The Clerk: Spell the last name.

A. C-o-a-t-s (spelling).

(Testimony of Ernest H. Coats.)

Mr. Rauch: Q. What is your business, Mr. Coats?

A. I am a part owner and operator of a service station on East Union.

Q. And what do you do at that service station?

A. We carry on a regular service station business, lubricate cars and service gas, and so on and so forth.

Q. And what do you sell there, if anything?

A. We sell gasoline and oils.

Q. What kind of gasoline? [68]

A. Richfield.

Q. How long have you been in that business?

A. At that particular location, Mr. Keith and I have been there for a year now.

Q. Did you ever work for the Union Service Stations, Incorporated, or the Union Oil Company?

A. Yes, I worked for them.

Q. Do you know when? Can you say when, about?

A. I worked for them for about five years.

Q. Do you remember what years, approximately?

A. From '31, I believe, until '36.

Q. Were you working for them in 1935?

A. Yes, sir.

(Testimony of Ernest H. Coats.)

Q. Do you know the Plaintiff, Mr. Ralph Hunt? A. I do.

* * * * * * *

(S. S. T. P. 32 Line 6 to P. 33 Line 3) Coats

Q. Now, that was between the dates of June, 1934, and November, 1934?

A. Yes, as close as I can figure it.

Q. Now I want to ask you if during that period of time you knew whether or not there was a jack at the station?

A. There was, yes.

Q. And can you state whether or not it was this jack?

A. It couldn't have been—it might have been this jack, but there is new parts on it, sir.

Q. Well, what was the difference, if any, with the jack as it was at that time and this one as you see it?

A. May I show you?

Q. Yes, step down and look at it.

A. Well, the jack that was over there at that time, on these little——

Q. Push it out this way so the jury may all see it.

A. There was ends knocked off of about two, if I remember right, of these little rachets right here, the ends of them, and when it come down to those, why you would have quite a jump in that handle when you would come down on those and it would drop down to maybe

(Testimony of Ernest H. Coats.)

the third one here, and when it did it would jerk this handle and it would be very unpleasant as [69] to handling it, and for that reason we stayed away from it as much as possible. We didn't use this as much as we could because there was two of these ends knocked off.

* * * * * * *

(S. S. T. P. 35 Line 6 to P. 36 Line 4)

Q. Did you ever have any further dealings at Fargo and Union other than this intermittent dealing while you were at Station 425 at 13th and Broadway?

A. Well, I was manager of it during the fall of '35 until it was leased out.

Q. As manager did you have anything to do with that defective jack that you described?

A. Why, yes. At that time Mr. McGrath was assisting Mr. Russell, or whoever the supervisor was then, and when I was made manager of it I immediately—I was a friend of Mr. McGrath's and I immediately called him and asked him to get me a jack that was—that I could use, one that would be safe, so it wasn't very long before he came over with a jack on the side of a running board of a car with the handle of it thrown over the fender, and he dropped that jack off to me. He gave me that jack, and took the one that was there away, and that is the last I have seen of it.

(Testimony of Ernest H. Coats.)

Q. That was the last you have seen of it. How long were you at 35?

A. Pardon, sir?

Q. How long were you at 73, or Union and Fargo?

A. I was there until it was leased out to Mr. Koch in the—it was in the spring of '36.

Q. During that length of time did that—was that jack ever returned while you were there which was sent away defective?

A. Not while I was there, no.

(S. S. T. P. 63 Line 18 to P. 64 Line 18)

EVERETT L. KEITH

was thereupon produced as a witness in behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

by Mr. Rauch:

The Clerk: State your full name, please.

A. Everett L. Keith.

The Clerk: K-e-i-t-h (spelling)?

A. Right.

Mr. Rauch: Q. Mr. Everett L. Keith?

A. (The witness nods his head.)

Q. What is your business, Mr. Keith?

A. Service station operator.

Q. Service station operator?

(Testimony of Everett L. Keith.)

A. Yes, sir.

Q. Are you acquainted with Mr. Coats, who has just testified? A. Yes, sir.

Q. What if anything do you have to do with him? A. How is that?

Q. What if anything do you have to do now with him? A. We are partners.

Q. You are his partner?

A. (The witness nods his head.)

Q. And what do you—what kind of a station do you operate? A. Richfield.

* * * * * * *

(S. S. T. P. 65 Line 3 to P. 73 Line 7)

Q. The east side of the river. Now, are you acquainted with Mr. Hunt?

A. Yes, sir.

Q. And that is the plaintiff in this case?

A. (The witness nods his head.)

Q. Have you worked for Union Service Stations, Incorporated, or the Union Oil Company? A. Yes, sir.

Q. Do you know whether you were working for them in the year 1934? A. Yes, sir.

Q. Do you know where you were working?

A. At Service Station Number 65 at Union and Oregon.

Q. 65 at Union and Oregon?

A. Yes, sir.

Q. Do you remember being at that station and working there in the fall of '34?

A. '34, yes, sir. [71]

(Testimony of Everett L. Keith.)

Q. And do you remember seeing Mr. Hunt at your station in the fall of '35?

A. '34.

Q. '34? A. Yes, sir.

Q. In the fall of '34? A. Yes, sir.

Q. And do you remember what time of the year it was, what time of the fall?

A. It was along in the fall of the year.

Q. Do you know whether it was early or late fall

A. Well, it was a little bit late in the fall because it was cold, I know, and raining.

Q. Cold and raining? A. Yes, sir.

Q. And you saw Mr. Hunt at your station when it was cold and raining in the late fall of '34?

A. (The witness nods his head.)

Q. Can you state what happened?

A. Yes. He drove in there in his car and asked me if I would go over and change a tire for him, and he said the car had—he had jacked it up and it had fell off onto him and hurt his back and he wanted to know if I would go over there, and he seemed to be in pain there, and his face was white and everything, so I told him sure, I would go over and change the tire, so I went over there and the car was right just as he had left it there, the jack was still laying underneath the car, and I jacked the car up——

(Testimony of Everett L. Keith.)

Q. Now, just where was it?

A. It was on First and Multnomah Street.

Q. First and Multnomah. Have you checked that so you are sure about that?

A. Yes, sir.

Q. And when did you last check that location? A. This afternoon.

Q. This afternoon?

A. It was practically about noon.

Q. About noon, and do you know whether or not there [72] is any building at that location?

A. Yes, there is an apartment house there.

Q. Do you know the name of it?

A. Why, I don't recall it right now.

Q. Do you know what it looks like?

A. Yes, it is a red brick building.

Q. A brick building. Well now, can you state just where the car was when you arrived with Mr. Hunt? In the first place, what was Mr. Hunt's condition when he came to the service station?

A. Well, he seemed to be hurt all right, he seemed to be in pain. I know he couldn't hardly get out from underneath the wheel to let me drive it over there. I drove the car back over to where the tire was at that he wanted changed.

Q. What was his condition that made you think he was in pain?

(Testimony of Everett L. Keith.)

A. Why, he was nervous and his face was white. I didn't want to go either because it was cold and rainy.

Q. Well, did he drive his car?

A. No, I drove the car.

Q. Do you know why?

A. Because he couldn't hardly drive it.

Q. He couldn't hardly drive it, you say?

A. Yes.

Q. And now when you got back to this apartment house at Multnomah and First Street, can you state just where the car was and what kind of a car it was, first?

A. It was a '30 or a '31 Plymouth coupe.

Q. Can you state now just where that car was, what its position was in the street?

A. It was parked on the wrong side of the street with the wheels, front wheels, cramped in towards the curb.

Q. Is that street level or does it slope there?

A. No, it slopes to the west.

Q. And which way was the car facing?

A. Towards the west.

Q. And with the front which way? [73]

A. West.

Q. And what part of that car was against the curb, if any? A. The left front wheel.

Q. The left front wheel. And can you state whether or not the car was in a position that it could move itself?

(Testimony of Everett L. Keith.)

A. No, it couldn't because the curb stopped it from rolling ahead, and it couldn't roll back uphill.

Q. It was uphill, back? A. Back, yes.

Q. And the curb was in front of it?

A. Yes.

Q. Now, you said, did you, that you saw a jack there?

A. Yes, the jack was laying underneath the car there right where it had fallen off of there.

Q. What kind of a jack was it?

A. It was an old Ford jack.

Q. And do you know what kind of a handle a Ford jack has, or that had?

A. It had a little short handle about that long (indicating).

Q. And was there anything other than that that you noticed about the car? Was it in good condition to run?

A. Yes, the car would run all right, I guess.

Q. Did it have anything the matter with it that required your attention or Mr. Hunt's?

A. Why, the right rear tire was flat on it.

Q. And do you know the shape of that car? You say it was a '30 or '31 Plymouth coupe?

A. (The witness nods his head.)

Q. Can you state what its shape is with respect to the rear of the car from the axle back? What is the shape of it?

(Testimony of Everett L. Keith.)

A. They have quite an overhang on the Plymouths. They are built rather low to the ground, and this one had a trunk rack on the back of it.

Q. It had a trunk rack in back? [74]

A. Yes, sir.

Q. Can you state what the structure of the car is as far as distance from the axle to the rear of it is concerned?

A. You mean to state the distance from the axle to the back of the car?

Q. Yes.

A. Oh, approximately four feet.

Q. Approximately four feet. Well now, what did you do when you got there?

A. Well, I took off my raincoat and laid it on the ground and crawled underneath there and jacked it up again with the same jack.

Q. Will you state why you crawled under it?

A. Because you couldn't walk under it.

Q. Well, why did you go under it?

A. To jack up the car.

Q. To jack the car up. Could you jack it up from outside any way other than to crawl under it?

A. Not with that jack, no. If the jack for the car had been there like it is supposed to be used on that car you could have jacked it up from the outside, but there was no other jack there.

(Testimony of Everett L. Keith.)

Q. What kind of jacks were supposed to be used on that car?

A. It is supposed to be a screw type jack that you could insert a handle in and push it back underneath there and stand on the outside and wind the car up without crawling underneath it.

Q. Do you know what form of jack was used generally in the community at that time with that type of car?

A. A screw type jack.

Q. Screw type jack. Well now, will you describe to the jury the difference between the screw type jack and the actual jack which was used to raise that car?

A. The Ford jack that they had there, you had a handle approximately so long that you would push down this handle and every time it would go down you would raise it a notch. With a screw type jack for that car it is supposed to be a screw so that you could push a handle into the jack and slide the jack under the car and stand back from under the car and turn the crank and raise your car up.

Q. Now, can you state which was the higher jack? [75] A. State which?

Q. Which was the tallest jack, standing on the ground?

A. The Ford jack that he had.

(Testimony of Everett L. Keith.)

Q. What was the difference in their height, can you show?

A. Oh, a Ford jack is approximately that tall and these little jacks that are supposed to come with the car are only about that tall (indicating).

Q. Do you know whether or not there was any provision on the screw type jack to keep it from slipping from under a car?

A. Yes. On top of the screw type jack there is four little prongs there that catch the axle to keep it from slipping off.

Q. Was there any such thing as that on the top of the Ford jack? A. No.

Q. Well, then when you arrived just what did you do besides jacking the car up?

A. I took the flat tire off and put the spare tire on, put the flat tire in the back of Mr. Hunt's car and drove Mr. Hunt up to his station.

Q. What station was that?

A. Union and Fargo, Number 73.

Q. And then can you state what happened then? A. Mr. Timmer brought me home.

Q. Mr. Timmer brought you home?

A. Yes.

Q. Was anything said at that time as to what had happened?

(Testimony of Everett L. Keith.)

A. When we drove in there they wanted to know what was the matter and he told him the car had fell off the jack and hurt his back, so they sent him on home then.

Q. Who stated that? A. Mr. Hunt.

Q. In your presence? A. Yes.

Q. To whom did he state it?

A. Mr. Timmer.

Q. Mr. Timmer? [76] A. Yes.

Q. And what was Mr. Timmer's position there? A. Manager.

Q. Manager of that station?

A. (The witness nods his head.)

Q. And the station was where?

A. Union and Fargo.

* * * * * * *

(S. S. T. P. 77, Line 23, to P. 78, Line 17.)

Q. Just a minute, please, Mr. Keith. When that jack that you speak of was used on a Ford, can you state whether or not a man had to crawl under the Ford to raise it?

A. Not on a Ford he wouldn't have to, no.

Q. Can you state the difference between that type car for which it was made and the one which Mr. Hunt attempted to use it on?

Mr. Powers: They have been all over this, your Honor.

The Court: Go ahead, answer the question.

(Testimony of Everett L. Keith.)

A. The type of jack that was used on the car there was for a Ford where you could jack up a Ford without getting underneath the car, but with this particular car you should have had a jack with a handle on it about four feet long to raise it without getting under the car.

Mr. Rauch: Q. And I believe you told Mr. Powers that Mr. Hunt told Mr. Timmer that a car had fallen off the jack. Do you know whether he said anything about his back at that time? Did Mr. Hunt tell him anything about the car hitting him?

A. Yes, he said that the car fell off from the jack and hit his back, hurt his back, and he went over to get me to fix the—put the tire on for him.

JAMES RALPH HUNT

(T. P. 131, Line 2, to P. 134, Line 8.)

Redirect Examination

A. The little jack I used was not all right. As far as I knew it was all right, I had been using it on other cars and it worked right along, yes.

Q. It worked all right for cars of the age and vintage that it was made?

A. Yes, it was.

(Testimony of James Ralph Hunt.)

(An objection was here interposed.)

Mr. Rauch: Q. Will you state for what particular car, if you know, that jack was made?

A. Well, the jack was made for a Model A Ford. It [77] came as equipment in my car.

Q. Can you state whether that was a high clearance or a low clearance car?

A. It had a high clearance in the rear end.

Q. Can you state whether that was a higher clearance or a lower clearance than the Plymouth which fell on you?

A. The Ford was a higher clearance than the Plymouth.

Q. Now, when you went under that car to place this jack, do you know how much space you had between the surface of the street and the lower parts of that car to get under it?

Mr. Powers: He went all over this, your Honor.

The Court: Well, I am not sure, this examination has taken so long, whether he has been over it or not. Go ahead and answer the question.

A. Well, when there was a flat tire there was practically ten inches clearance between the axle and the ground.

Mr. Rauch: Q. Now, do you know the structure of that Plymouth car well enough to know whether or not in dropping say two or three

(Testimony of James Ralph Hunt.)

inches the springs would let it go lower than it was when you found it and crawled under it?

A. Well, if it dropped down on a flat tire the rear end would drop three to four inches.

Q. By the action of the springs?

A. By the action of the springs.

Q. Now, it was spoken here about a long handle. Would a long handle have added to that jack that you used, that Ford jack, have helped the situation any?

A. No, it wouldnt' have. It wouldn't have worked at all.

Q. You couldn't have used it at all?

A. No, sir.

Q. Why?

A. Well, you take a long handled jack, there wouldn't have been clearance enough in the rear end to have got it to catch either way, to go up or down.

(An objection was here interposed; objection overruled.)

Mr. Rauch: Q. Then will you state whether a simple longer handle was required to make a safe tool or an [78] entirely different jack?

(An objection was here interposed; objection overruled.)

A. What I should have had is a telescope jack with a screw type action on it. You should

(Testimony of James Ralph Hunt.)

have had an extension handle that extended on beyond the end of the car and that fitted into this jack, and you could have screwed the jack up. You could have stood out at the rear end of the car and turned the jack and raised the car up.

Mr. Rauch: Q. Now, I want to ask you why it was you didn't take the big jack out?

A. Well, the big jack was too heavy. It required two men to lift that jack.

(An objection was here interposed; objection sustained.)

Mr. Rauch: Q. All right, I will ask this; something was said about an able bodied assistant. State whether or not if you had had one you could have taken the large jack.

A. Yes, I could have.

(An objection was here interposed; objection overruled.)

A. If I had had an assistant he could have lifted the jack in and out of the car.

Mr. Rauch: Q. Now, you stated this morning that this particular jack which was exhibited was not the jack, the large jack, which was about the station at that time. Can you state what, if any, actual difference there was in the structure of the jack that was there and this one, if you know?

(Testimony of James Ralph Hunt.)

A. Well, the jack that was at the station at that time, the teeth and the ratchet effect on one end of the teeth was sheared off, and the spring handle, when you would work the spring handle it would stick. I don't know how this one works. The other one wouldn't release properly. You would squeeze that and it wouldn't give. You would have to shake the jack to get it to release.

Q. What was the effect on one using it?

A. Well, when you shook that thing it jarred you and all at once it let go and this handle would fly up and you would have to hang on to lower it down.

* * * * * * *

(T. P. 138, Line 11, to P. 139, Line 12.) (R. Hunt.)

Q. You say if there had been an able bodied assistant there he could have lifted the jack in, the regular jack there at the station, and you could have taken it with you?

A. Yes, sir. [79]

Q. Mr. Snell was there, of course?

A. That is right.

Q. Did you ask him to lift it in?

A. I didn't ask him to lift that jack in, no.

Q. No. What kind of a jack did they furnish with those Plymouths when the car was put out, do you know?

(Testimony of James Ralph Hunt.)

A. Well, offhand I don't know. I believe it is a screw type jack.

Q. As I understood you to say that the reason that you had to get under there was because of your back, you couldn't bend around and reach under to reach it and you had to crawl under because of the condition you were in.

A. You couldn't have reached around under the Plymouth anyway.

Q. It wouldn't have made any difference then about your back?

A. My back hadn't——

Q. Anyone would have had to crawl under it, is that correct?

A. That is right, they'd have had to crawl under it.

Q. It wouldn't have made any difference?

A. No.

Q. Unless they had used the jack that was out at the station, then you couldn't crawl under it and use it?

A. You'd have shoved it under.

Q. Just shove it under and you wouldn't have got under it at all?

A. That is right.

* * * * * * *

(Testimony of James Ralph Hunt.)

(T. P. 140, Line 21, to P. 141, Line 2.) (R. Hunt.)

Q. Had Mr. Snell gone and helped you in with the jack after he had refused to go to this place where the tire was to be fixed and you had gone, how would you have gotten the jack out of the car?

A. I couldn't have gotten the jack out of the car. If he had lifted that jack up into the rumble seat of my car I would never have gotten it out. [80]

Plaintiff testified that when the car slipped off the jack it came down striking him in the back in the same region of his back sprain, that he was again momentarily paralyzed in his legs and he was unable to go on with his work although he did drive his car a few blocks down to the closest Union Service Station, where an employee from that station drove plaintiff back to where the tire was being changed from the car, the other employee changed the tire and then drove plaintiff back to his own station. From there plaintiff went home. Shortly thereafter, and on the same day, plaintiff was taken by his wife to Dr. Dillehunt's office. Dr. Dillehunt recommended a fusion operation of the lower vertebrae of the spine. Some three months thereafter, the plaintiff, together with Mr. Russell, his superior who then was district manager of the

(Testimony of James Ralph Hunt.)

Union Oil Company in Portland, called at the Hartford Accident and Indemnity Company's claim office in the Lewis Building in Portland, Oregon, where they talked with the insurance company's claims adjuster, Harry G. Hadfield. The claims adjuster was already acquainted with plaintiff's prior accident of June 11, 1934, and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back, that he had gone to Dr. Dillehunt and Dr. Dillehunt had recommended a fusion operation of his spine. Plaintiff inquired whether the insurance company would take care of the matter. The claims adjuster for the insurance company said that the insurance company would pay for the operation and pay plaintiff's other medical and hospital expenses and pay the plaintiff compensation at the same rate as prescribed under the State Workmens Compensation Act. Plaintiff then went to the hospital on February 28, 1935, and a fusion operation on his spine was performed by the said Dr. Dillehunt. Plaintiff was in the hospital from February 28, 1935, [81] until April 20, 1935, and was convalescing from the time he was discharged from the hospital until June 24, 1935, at which time he was discharged by Dr. Dillehunt as completely cured and able to return to work and at that time plaintiff went back to work at a filling station of the defendant. He

(Testimony of James Ralph Hunt.)

was given light work for the first few weeks and then reassumed his regular work. Plaintiff after the operation was able to discard his back brace and has never had to wear it since his operation. Plaintiff continued working as a service station attendant for the defendant and at the same station where he testified he was working when the accident occurred which brought on his back trouble. Plaintiff continued on at this same service station after he left the employ of the defendant, this service station having been leased by the plaintiff and another from the defendant and they continued operating it until about February 1, 1938, at which time plaintiff discontinued his employment at the service station and entered the employ of the American Tobacco Company, where he has been working ever since. His work for the American Tobacco Company is that of salesman. He drives a light delivery truck covering a territory out of Chico, California. At the time plaintiff went to the hospital for his operation until he returned to work several months later, he was dropped from the payroll of the Union Oil Company. During this period he received compensation payments from the Hartford Accident and Indemnity Company about every two weeks. The amount of his compensation payments was the same as prescribed under the Workmens Compensation Act of the State of Oregon. The conditions on the draft and the insurance policies under which

(Testimony of James Ralph Hunt.)

these payments were made are described hereinafter under the heading of "Exhibits." The arrangement leading up to the payment of the compensation benefits by the Hartford Accident and Indemnity Company, plaintiff's [82] employer's insurance carrier, was testified to as follows:

(T. P. 98, Line 22, to P. 99, Line 10.) (R. Hunt.)

Q. And they gave you the kind of work to do around with credit cards for a while, didn't they? A. Yes, they did.

Q. And while you were working on those credit cards you actually earned more money than you had earned out there at the station?

A. I don't know why. I got the same check.

Q. Well, you didn't get the same amount, did you? Didn't you get commissions?

A. I got commissions through the sales at the station, yes.

Q. Didn't you get commissions and an allowance, mileage allowance, for your car when you used your car?

A. I was supposed to, but I never did get all those allowances that were coming to me. They paid me some expenses on my car, but they never paid all of them. [83]

(Testimony of James Ralph Hunt.)

Plaintiff testified, T. 99 to T. 101,

Cross Examination

"Q. Then you got your wages right through from July 1st, 1934, or, for that matter, in June also of 1934, the time the first accident occurred, you got your wages right through up to the time you went into the hospital?

A. Yes, sir.

Q. Then when you went into the hospital for the operation you got compensation payments? A. That is right.

Q. And you got those compensation payments during the time that you were unable to go to work, during the time you were in the hospital and the time that you were off work?

A. Yes, sir.

A. And that period ended about June 24th, 1935? A. Right.

Q. And then isn't it a fact that you were overpaid some compensation there of about twenty-three dollars? A. Yes, sir.

Q. And isn't it a fact that after you had gone back to work you received this compensation check from the insurance company that was paying it to you and then you took the check and cashed it? A. That is right.

Q. Although you had gone back to work?

A. (Witness nods his head.)

(Testimony of James Ralph Hunt.)

Q. Isn't it a fact that when that was called to your attention that you agreed to have that money repaid? A. That is right.

Q. About twenty-three dollars?

A. And it was repaid.

Q. Now, there is no dispute along in there at all about that; you got your compensation, you got your medical bills paid for you and you had gone back to work and you were getting along all right; that is a fact, isn't it?

A. Yes, sir.

Q. That had the endorsement on there, full settlement, for that compensation? [84]

Mr. Rauch: Just a minute, please. I think the checks are the best evidence, and I think that is subject to cross examination.

Mr. Powers: I think that is probably correct.

Q. But you did get that money, you say, as you went along, compensation payments?

A. Yes, sir.

Q. You had those doctor bills paid for you?

A. Yes."

(T. P. 102, Line 13 to Line 15.) (R. Hunt.)

A. As far as the operation was concerned I guess his work was all right, but I am not satisfied with the condition I am in today.

Then T. 103 to T. 106:

"A. Well, Dr. Dillehunt told me that it was a very—that it was a tough operation, he told

(Testimony of James Ralph Hunt.)

me that, and he didn't say how they would perform it or how they would do it, he just told me it would be a bad operation and he told me that I would probably be in the hospital for three or four months. Outside of that, that is about all that was said. I couldn't find anyone else that had ever had a spinal fusion.

Q. Did you know that you were going to receive compensation payments when you were in the hospital? A. Yes, sir.

Q. How did you know that?

A. Well, Mr. Russell told me that when I went to the hospital that I would go off of full salary.

Q. That you would go off of full salary?

A. Yes.

Q. And were you told that you would receive compensation payments and that the doctor bills would be paid for you?

A. Yes, sir.

Q. And you accepted those?

A. Did I accept the checks?

Q. You accepted the compensation payments and the payment of the doctor bills?

A. I accepted them, yes.

Q. You accepted those from the Hartford Accident and Indemnity Company; you knew there was a policy there, didn't you?

(Testimony of James Ralph Hunt.)

A. I surmised there must be or they wouldn't be paying it.

Q. Well, did you talk with anyone that had to do with that policy? [85]

A. The day before the operation Mr. Russell and I went down and talked to Mr. Hadfield and he asked me how much I was making a month, and he told me the percentage I would be paid every two weeks on my salary.

Q. And who was Mr. Hadfield?

A. The representative for the Hartford Accident people.

Q. The Hartford Accident and Indemnity Company? A. Yes.

Q. And they were going to pay you the compensation that you would lose, is that right?

A. Yes, sir.

Q. That payment was to be made on the same basis as you would receive from the State if your employer had been under the State?

A. Well, I didn't know what basis it would be paid on. He told me I would get fifty-three per cent of my salary.

Q. Well, was there a discussion there that that was the basis that the State Compensation fund pays?

A. I don't remember anything—if I remember right I think he said that fifty-three per

(Testimony of James Ralph Hunt.)

cent would be a little more than what I would be paid ordinarily.

Q. Under the Compensation?

A. Under Compensation.

Q. Well, wasn't that because they gave you credit because of the extra money you had made because of the commissions? They took that into consideration to get your salary up a little bit for you to help out in going into that operation and get you a little more money per month?

A. That is right. I was entitled to that.

Q. And you had a choice then of going in and taking those compensation payments and having the bills paid for you or else suing the Union Oil Company, isn't that so? You could do one or the other?

A. Well, I imagine so. At the time I was interested in getting well.

Q. Yes, and you thought it was better to take these compensation payments and have your bills paid than to go into a lawsuit with them?

A. I didn't think anything about that.

Q. Well, that was the proposition, wasn't it, whether you would take the compensation payments and the——

A. There was nothing—well, they told me that they would pay my salary in the form of compensation, yes. [86]

(Testimony of James Ralph Hunt.)

Q. Well, wasn't that your understanding?

A. They didn't mention anything about a lawsuit, and I didn't either.

Q. Well, wasn't it understood there that these payments would be made under that policy to you in lieu of any claim that you would have?

A. No, sir, I was never asked about that.

Q. Did you understand that they were paying you there and paying these bills and that you could still sue them for this same injury?

A. I didn't under—— there was nothing said about that. They said they would pay me compensation and there was nothing said about suing anything, and I didn't understand one way or the other.

Mr. Powers: Q. Well, you knew when you were signing and you were taking the checks they said, "Release in full" for that compensation?" * * * [87]

(S. S. T. P. 17, Line 10, to P. 18, Line 3.)

A Juror: Is there any significance to that?

Mr. Powers: No.

The Juror: Oh. That is all right, then.

The Court: Let me see the checks.

(The checks were handed to the Court.)

Mr. Powers: Now, these checks——

The Court: Mr. Powers, just a minute.

(Testimony of James Ralph Hunt.)

Mr. Powers: Yes.

The Court: I think I want to make some comment to the jury about them. Just so we keep these dates straight, gentlemen of the jury, the plaintiff now has fixed the time of the accident for which he is suing as November 5th, 1934. He testified that he hurt his back earlier in the year in June, 1934. He went to the hospital in——

Mr. Powers: February 28, '35.

The Court: In 1935. These checks run through '34 and '35 and later in the case after it is all in there may be some questions for your determination as to the place in the case of all of the dates, including the dates on the drafts.

* * * * * * *

(S. S. T. P. 21, Line 17, to P. 22, Line 13.)

The Court: I want to make this further statement to the jury, Mr. Powers.

Mr. Powers: Yes, your Honor.

The Court: That insurance policy insured the company for which the plaintiff worked up to July 1934——

Mr. Powers: July 1st, 1934, yes, your Honor.

The Court: Yes. When he was first injured, which is not the injury he is suing on here, in June of '34, he was working for the company that that policy insured, and that company is

(Testimony of James Ralph Hunt.)

not now in the case. And that insurance ran out by its terms, did it not, Mr. Powers?

Mr. Powers: Yes, your Honor.

The Court: At the end of June, 1934? [88]

(T. P. 110, Line 2, to Page 111, Line 11.)

The Court: I think I want to make some statement to the jury about them. Just so we keep these dates straight, gentlemen of the jury, the plaintiff now has fixed the time of the accident for which he is suing as November 5th, 1934. He testified that he hurt his back earlier in the year, in June, 1934. He went to the hospital in——

Mr. Powers: February 28th, '35.

The Court: In 1935. These checks run through '34 and '35, and later in the case after it is all in there may be some questions for your determination as to the place in the case of all of the dates, including the dates on the drafts.

(Mr. Powers thereupon explained Defendant's Exhibits 9 to 21, inclusive, further to the jury.)

The Court: I want to make this further statement to the jury, Mr. Powers.

Mr. Powers: Yes, your Honor.

The Court: That insurance policy insured the company for which the plaintiff worked up to July, 1934.

(Testimony of James Ralph Hunt.)

Mr. Powers: July 1st, 1934, yes, your Honor.

The Court: Yes. When he was first injured, which is not the injury he is suing on here, in June of '34, he was working for the company that that policy insured, and that company is not now in the case; and that insurance ran out by its terms, did it not, Mr. Powers?

Mr. Powers: Yes, your Honor.

The Court: At the end of June, 1934?

Mr. Powers: That is correct.

The Court: That insurance was not in force at the time when he claims he was injured later in November, the case for which he is suing here, and that insurance did not insure the employer for whom he was working in November, '35, when he claims he was injured, the injury which he claims he suffered for which he is suing here. All those things will have their place at the time of the instructions and will be dealt with by the lawyers in their arguments. [88½]

(T. 111 to T. 114):

Mr. Powers: Q. You knew that was on the back of the checks, in other words?

A. Well, when I signed the checks it stated on the back that it was for the compensation for that lost time while I was in the hospital.

Q. Yes. You were able to read? I mean you

(Testimony of James Ralph Hunt.)

could read what was on the back of the checks and you could see what was on the front of the checks, too, for that matter, couldn't you?

A. It stated on there that they were paying me for the time that I was losing every two weeks from being off work in the hospital.

Q. In other words, you were familiar with what was on the checks when you signed them?

A. I read what was on the checks.

Q. Yes. Then you were paid up to the time you went back to work and a little beyond that?

A. Yes.

Q. And when it turned up or developed that you had been paid a little beyond that, why you paid that back? A. Yes, sir.

Q. Well now, did you ever make any—when did you go down to the Hartford Office to see about getting these compensation payments and medical attention?

A. The day before I went to the hospital Mr. Russell and I went down to the Hartford office. [89]

Q. That would be about February 27th, then, I presume? A. Around there, yes.

Q. Yes, and you had some discussion there with Mr. Hadfield, you say?

A. Yes, we did.

Q. And did you tell him about the accident there in November when a car fell on you?

(Testimony of James Ralph Hunt.)

A. He wanted to know what kind of operation I was going to have and I told him that a car had fallen and hurt my back and that they were going to—Dr. Dillehunt was going to perform a fusion.

Q. Yes. So in making the arrangements there for the compensation payments and the hospital expenses, it was to cover the accident that you have been referring to in November?

A. Well, according to the arrangements, why they didn't state just what accident they was going to pay for.

Q. But I say you told him about that accident, though? A. Surely I told him.

Q. And you wanted to go to the hospital because of that and get your hospital bill paid, your doctor bills paid, and get compensation, and that is what they agreed to do, wasn't it?

A. They agreed to pay me for my time while I was out and correct the condition of my back, yes.

Q. Well, you didn't have any talk with Mr. Hadfield about your back? You had that with the doctor, didn't you?

A. Well, all he did was just what kind of operation they was going to perform, that is all that I knew.

Q. Yes, and you told him about going up to Dr. Dillehunt there in November and he said

(Testimony of James Ralph Hunt.)

that you needed an operation and you wanted to get it; that was it, was it? A. Yes, sir.

Q. So in talking with Mr. Hadfield about it you were talking about your condition at that time and everything that occurred up to that time? A. Yes.

Q. Yes. You think you told Mr. Hadfield that a car fell on you at that time?

A. I think I did. I explained what happened.

Q. Did you ever make any claim then to Mr. Hadfield—how did he get those checks to you? How did you get your checks? [90]

A. They were mailed out every two weeks.

Q. Mailed out from the Hartford?

A. From the Hartford.

Q. And they would come out there to you?

A. They went to my house to my wife, yes.

Q. Yes, and you got those all right, then you were overpaid two or three weeks and you returned that money to the Hartford?

A. Yes, sir.

Q. And that was after you had gone back to work?

A. That was after I had gone back to work.

Q. And did you ever make any further claim to the Hartford for any additional compensation of any kind?

(Testimony of James Ralph Hunt.)

A. No, I never talked to the Hartford people after I got out of the hospital."

(T. P. 115, Line 11, to P. 116, Line 3.) (R. Hunt.)

Q. Well, then when did you first decide to bring a lawsuit against the Union Oil Company?

A. Oh, it was after I left the company. I knew I couldn't do any hard work and that I was crippled for the rest of my life as far as making a living doing heavy work. I would have to do light, easy work.

Q. You decided at that time to bring a lawsuit?

A. I thought I would see what could be done about the condition of my back.

Q. Did you go back to Dr. Dillehunt?

A. No, sir. Dr. Dillehunt told me I was well, that he had done all he could do for me.

Q. Well, did he tell you you could do hard work?

A. No, he told me to do light, easy work.

Q. He didn't tell you you could do any lifting or anything like that?

A. No. He says, "If you wait long enough," he says, "maybe you can do heavy work some day." [91]

(T. P. 119, Line 2, to P. 121, Line 22.) (R. Hunt.)

Q. I am showing you, Mr. Hunt, Defendants' Exhibit 21, Pre-Trial Exhibit 11, and

(Testimony of James Ralph Hunt.)

asking you if you know when you first saw that?

A. This is the first time I have seen this.

Q. Here in the court room?

A. Right here in the court room.

Q. Were you a party to that in any way? Is your name on it? Look it over.

A. No, I wasn't a party to that as far as I knew. I made payments to the Union Oil Company for my insurance.

Q. How is that?

A. I say I made payments to the Union Oil Company for my insurance.

Q. Did anyone ever tell you that that the Hartford Insurance Company was insuring you against loss of time?

A. No, they didn't.

Q. Or for any other purpose?

A. No, sir.

Q. At the time you went down to the insurance company with Mr. Russell, did he show you that policy?

A. No, sir, I didn't see this policy.

Q. Did he refer to it to you and tell you about it? A. No.

Q. Tell you that the insurance company was going to pay you, the Hartford would?

A. He told me at that time that I would get my salary from the Hartford Accident people,

(Testimony of James Ralph Hunt.)

that I was going off of full time and onto loss time accident.

Q. Will you look on the back of that and see if there are any bills attached and receipts of payment?

A. Payments of the Union Station to the Hartford Accident Company.

Q. How is that?

A. I say there is some bills here or statements stating that the Union Service Station was paying the Hartford Accident people for this policy.

Q. That is the Union Service Station, Incorporated, paid the Hartford Accident people for that policy? [92]

A. That is right.

Q. You didn't contribute in any way?

A. No, sir.

Q. You stated today, I think, that you supposed that this money which you paid in for your compensation in case you were sick or injured——

(An objection was here interposed.)

The Court: He has not asked any question yet. Let's let him finish the question first.

Mr. Rauch: Q. I so understand that you stated that. I will give you a chance now to state whether or not you made such a statement

(Testimony of James Ralph Hunt.)

or intended to make such a statement. Don't answer now.

(An objection was here interposed.)

Mr. Rauch: I would rather state the question over, if your Honor please.

The Court: All right.

Mr. Rauch: Q. Mr. Hunt, will you state if you remember what you told Mr. Powers with respect to what you understood the two dollar payments were which were deducted from your pay check?

A. Well, I understood that the two dollars went to the Union Oil Company and in time of sickness or of an accident that they would pay our salary and our expenses while we were off.

Q. Did you state anything to Mr. Powers that you remember about an employees' fund this morning?

A. I told him that we contributed two dollars a month to the Employees' Fund.

Q. Now did you understand the money which you contributed to the Employees' Fund was to be paid to the Hartford Insurance Company for the benefit of the Union Service Stations, Incorporated?

A. No, sir, I didn't know anything about the Hartford Insurance Company until the day before my operation, when they told me that

(Testimony of James Ralph Hunt.)

they would pay my salary while I was in there. [93]

(T. P. 122, Line 5, to P. 123, Line 25.) (R. Hunt.)

Mr. Rauch: Q. Now, did I understand you to state that you did tell Mr. Hadfield when you and Mr. Russell went down to the insurance company that you had had an injury, the latter injury of November 5th, 1934?

A. Yes, I did tell him that I had been hurt.

Q. So they understood there, as far as you know? A. Yes, sir.

Q. Handing you Defendants' Exhibit 10, so marked for identification, I will ask you, please, what that is.

A. That is a compensation check for the payment of my wages from the date——

Mr. Powers: The check speaks for itself, now, for the dates stated on here.

Mr. Rauch: Q. Now, will you please turn over on the back and will you read again for me what is on there?

Mr. Powers: Well, the same objection, your Honor. It speaks for itself.

The Court: Well, he can read it, Mr. Powers. You read, so he can read it.

A. It says, "The endorsement of this draft by the payee constitutes a clear release and receipt in full settlement of the claim stated on the other side."

(Testimony of James Ralph Hunt.)

Mr. Rauch: Q. Now, for what period of time is the account on the other side? What period of time were you paid?

A. It is paid from the second 25th to the third——

Q. From what, again?

A. From the second month, 25th day.

Q. That is February 25th?

A. February the 25th to March the 15th.

Q. And is it marked so as to show what it was paid for?

A. It says—I don't see where it states what it is paid for. It is the date of accident, paid by the Union Oil Company.

Q. I don't want to ask you to read; I want to ask you, can you state if you knew at that time for what that check was made?

A. That check was made for my salary from those dates, to pay my share——

Q. What are the dates again, please? [94]

A. From February the 25th to March the 15th.

Q. And will you again refer to the back where it says, "On account stated on the other side" and then will you turn over again and see if it states for what accident that loss of time was paid as on account?

A. It states that this was paid for the accident on the eleventh month, 5th day, 1934.

(Testimony of James Ralph Hunt.)

Q. What day was that?

A. That was the 5th day of November, the date of my last accident. [95]

(T. P. 124, Line 7, to P. 125, Line 25.) (R. Hunt.)

Mr. Rauch: Q. Now, I will ask you to look at Defendants' Exhibit 11 and see if you can state from that for what purpose that check was paid.

A. This was paid for compensation from the 16th day of March, it says, "inclusive," that is all it says, "Inc."

Q. From what?

A. It states it was paid—it says, "Compensation 3/16 to the 30th" of that month.

Q. That is, from March 16th to March 30th?

A. To March 30th.

Q. Does it state on account of what cause that is paid?

A. No, it does not state here on what cause.

Q. Will you look at the same place where you found the date 11/5/34 and see what the mark is on that, what the date or mark is on that. A. The date is 6/11/34.

Q. How is that put on there?

A. It is in pen.

Q. What is the typewritten amount?

A. The typewritten amount is 11/5/34, and it is scratched out.

(Testimony of James Ralph Hunt.)

Q. From whom did you receive those checks?

A. I received these checks from the Hartford Accident people.

Q. Did they come to you through the mail?

A. Yes, they did.

Q. Was there any communication accompanying them?

A. There was a receipt came with them.

Q. How is that?

A. I say there was a form came with them stating what I was receiving the check for.

Q. Did they give you any letter at that time?

A. No letter other than telling just what the check was for and the date it was for.

Q. Did it state—I will ask you if you can tell me [96] what these papers are.

A. These are the letters that came with the checks.

Q. Whose signature is on there?

A. Harry G. Hadfield.

Q. Is that the signature on the letter that bore the check? A. Yes, it is.

Q. Have you seen that signature often enough to know whose it is?

A. Yes, sir.

Q. And whose is it?

(Testimony of James Ralph Hunt.)

A. It is the agent for the Hartford Accident people. [97]

Then T. 189 to 191:

"Q. The compensation payments that you thought you were receiving there, Mr. Hunt, were they figured out down in Mr. Hadfield's office that day, the percentage you would get of your wages?

A. The compensation checks, they figured out it would be approximately fifty-three per cent.

Q. And that corresponded with the Industrial Accident Commission of the State?

A. I think so.

Q. And you told Mr. Hadfield about your trouble there in November, too, about your back? It had come back on you anyway, or you were going to have to have an operation after that November episode, or something to that effect, did you?

A. Mr. Russell explained to Mr. Hadfield that it was necessary for me to have an operation, and when I got down there he asked me about my back, and what had happened, and I told him just what had happened, and all he did was to tell me what percentage I would get of my salary. He asked me approximately how much I was making a month.

(Testimony of James Ralph Hunt.)

Q. And then did he say he would pay the doctor bill?

A. He said the doctor bill and hospital bill was taken care of.

Q. He would pay those, and then you received those and you got these letters about compensation payments that you have here, I mean the enclosures that have been introduced in evidence? A. Yes.

Q. You got a few others too, I believe, later on. Have you got those originals with you, other transmittal letters?

Mr. Rauch: I have them here if you care to see them.

Mr. Powers: Q. Well, I will just ask you briefly to save time, some of them refer to one date of the accident and some to the other, is that correct? A. Yes." * * *

"Mr. Powers: Q. You got paid from Maccabees ten dollars a week, too, I think you said?

A. Yes, sir.

Q. And then besides that you got the compensation from the Hartford?

A. Yes, sir." * * * [98]

(T. P. 191, Line 7, to Line 10.) (R. Hunt.)

Q. Did you pay the Maccabee the premium for that insurance that you got?

(Testimony of James Ralph Hunt.)

A. Yes, sir, I paid Maccabee seventy-five cents a month for that small premium that paid ten dollars a week for fifteen weeks.

The insurance company adjuster testified that the compensation payments were made to the plaintiff partly under one policy and partly under another, that he first started paying under the policy, Exhibit 27, which covered the Union Oil Company, and then switched the claim and made payments under policy, Exhibit 26, which was issued to Union Service Stations, Inc., saying that the reason for this was that Dr. Dillehunt after the first two compensation payments had started, had informed him that the injury was a recurrence of the June 11th sprain.

MR. HARRY G. HADFIELD,

called as a witness for the defendant, testified (T. 169 to 181):

"Q. Now, with respect to the Hunt accident, there were certain payments that were made, compensation payments, in the form of drafts to Mr. Hunt and also to Dr. Dillehunt and the hospital? A. Yes, sir.

Q. Can you tell us what brought about those payments? Did you talk with Mr. Hunt about his accident, and Mr. Russell?

(Testimony of Harry G. Hadfield.)

A. What brought about the payments?

Q. Yes. How was it that you made those payments? [99]

A. Well, a claim was reported to us in June of 1934 under which there was only one payment made up until along later in the year. The first payment was made to Dr. E. W. Simmons. Then——" (Interruption)

"Q. Then when did you talk with Mr. Hunt and Mr. Russell in your office? Did they come over there or not? A. Yes.

Q. And you talked with Mr. Hunt at that time? A. Yes, sir.

Q. And did Mr.—what did Mr. Hunt tell you, if anything, about the occurrence there on November 5th, 1934?

A. Mr. Hunt explained that he had had a recurrence of an injury that he had had in June, I think it was June the 11th, 1934.

Q. What, if anything was said about an operation?

A. He said they had talked to Dr. Dillehunt and he had recommended a fusion operation.

Q. What kind of an operation?

A. Fusion. I think that was pronounced right.

Q. And what, if any, arrangements were made then with respect to compensation?

(Testimony of Harry G. Hadfield.)

A. There had been some time elapse from the injury of June the 11th, and there was a little question as to whether or not we would take care of those payments, and for that reason Mr. Russell had telephoned me. He said they would like to come over and talk to me about it. They came over, and——" (Interruption)

A. Mr. Hunt and Mr. Russell came over to the office and said that Dr. Dillehunt had recommended this fusion operation, and I didn't know what it was myself. I hadn't had any experience with it before, and so I asked him just what the operation meant. He informed me of what they would have to do to the joints there, and so I asked him at that time how that happened. He stated that he had sprained his back as the result of changing a tire, and I told him we had had a report of an accident in June of the same thing and he said yes, it was a recurrence of the first injury.

Mr. Powers: Q. And did he tell you that any car had fallen on him at any time?

A. No, sir.

Q. And what was said with respect, now, to getting you to pay him compensation payments and take care of the doctor bills and hospital bills?

(Testimony of Harry G. Hadfield.)

A. They asked me if that would be taken care of by the Hartford. I told them that if Dr. Dillehunt had recommended [100]

(T. P. 173, Line 16, to P. 176, Line 7.)

Mr. Rauch: I object to that, our Honor. There is only one policy in evidence. They produced it, and they certainly must certify as to the truth of that exhibit. One policy only has been offered, and it seems to me it is entirely outside of the issues and also particularly outside of anything that has been framed.

Mr. Powers: Q. Do you have the original policies with you?

A. I have two of them here.

The Court: Do you mean you are taken by surprise, Mr. Rauch?

Mr. Rauch: Why certainly, your Honor. They have laid their claim——

The Court: We will take the morning recess, gentlemen.

(The jury was excused, and the matter was argued pro and con without the presence of the jury by respective counsel; at the conclusion of the argument, the Court, in the absence of the jury, ruled as follows:)

The Court: Well, now I will tell you, Mr. Rauch. I am not going to pin myself down to

the particular dates that are written on these drafts, and I would be willing to sit here and listen to you for a long while gladly if I really thought that you were surprised by this and that your case was affected by it, but I don't see that, and it may be necessary to amend the pre-trial order, I am not sure of that. I will look up the rule pretty soon, but if we were just trying this case, Mr. Rauch, without the pre-trial in the old fashioned way, and a man came in here with two policies instead of one, we would just treat that as a routine development on the other side, and I don't see that you have been kept from any preparation you could have made. You still have your rebuttal.

Mr. Rauch: Well, if your Honor views it that way I will withdraw my objection.

The Court: I am going to tell the jury at the end, if the case goes to the jury, unless Mr. Powers can persuade me as a matter of law that this is a release, and that is not my feeling just now, I am just going to give this to them as to whether there was a meeting of the minds on a settlement, if it goes to the jury. That is my present feeling, that the situation is part in parol and part in writing, but I shall leave it all to the jury to pass on that question. And so I will admit that policy.

(The policies of insurance so offered and received in evidence were marked De-

(Testimony of Harry G. Hadfield.)

fendant's Exhibits 26 and 27, respectively.) [101]

"Mr. Powers: Q. Do you have the original policies with you?

A. I have two of them here." (Interruption)

"Q. Mr. Hadfield, I was asking you about the drafts, and I noticed one bears the number 543012, and one bears the number of 519380, giving policy numbers. How is it that there were two different policy numbers there on the drafts?

A. Well, that would come on the expiration of one policy and another one started. These policies run for a year at a time.

Q. And one policy had expired on July—I think the policies are in evidence now. May I have those?

A. It was in July, I believe.

Q. Well, was there a policy in force at the time he went to the hospital for the Union Oil Company, the same time?

A. Yes, sir. * * *

A. One expired July 1st and one on June 30th.

Q. Now, which one expired July 1st? Who was that written for?

A. That was written for the Union Service Stations, Incorporated.

(Testimony of Harry G. Hadfield.)

Q. That expired what date, you say?

A. That expired July 1st, 1934.

Q. And when did the other one go into effect?

A. The other one would go into effect the same day.

Q. And when did it expire?

A. On June 30th, 1935.

Q. So there was a policy in force, then, both in June and in November, is that correct?

A. Yes, sir.

Q. And some of the drafts here were paid under one policy and some the other, is that correct? A. That is right.

Q. So, so far as policy coverage was concerned, it didn't make any difference whether —— (Interruption) [102] the operation, if it was a recurrence of the first injury, we had nothing to do but to take care of it.

Q. And did you go into the matter of how much compensation he would get, or anything like that?

A. Yes. They wanted to know what it covered and I informed them that we would——

Q. They wanted to know what it would cover, you say?

A. Yes. I informed them that we would have to take care of the medical and hospital

(Testimony of Harry G. Hadfield.)

bills and also pay him a percentage of his wages the same as the Industrial—State Industrial Accident Commission would pay.

Q. And was the amount of his compensation payments then on the state basis figured out?

A. Yes, sir.

Q. And was it figured out there in Hunt's presence? A. Yes, sir.

Q. And what did that figure out?

A. Well, I have a chart to go by.

A. I have a chart that the State Industrial Accident Commission pays, and it figured out fifty-three per cent.

Q. And that is the same as the State Industrial Accident Commission pays, is it?

A. Yes, sir.

Q. And did you make those payments to him then after he went to the hospital?

A. Well, we started in. I don't remember whether we paid every week or every two weeks, I have forgotten that.

Q. Now, I see that there are two different policy numbers referred to on the drafts. That is, one draft here of March the 11th, 1935, bears policy number 543012. Can you tell me which policy that——" (Interruption) [103]

(Testimony of Harry G. Hadfield.)

(T. P. 177, Line 20, to P. 179, Line 12.)

Mr. Rauch: Just a minute. May it please your Honor——

Mr. Powers: Q. ——whether the payments were made at one time or another, either in June or November, is that correct?

The Court: Don't answer.

Mr. Rauch: May I have an opportunity to examine these before he proceeds with his examination?

The Court: Yes.

Mr. Powers: Possibly I could recall this witness and Mr. Rauch could examine them at noon, because I have a man who has to go to a funeral this afternoon, and I would like to put him on out of turn if it is agreeable with Mr. Rauch.

Mr. Rauch: That is all right, if it is agreeable with the Court.

Mr. Powers: Step down, Mr. Hadfield, please.

(Witness temporarily excused.)

* * * * * * *

Mr. Powers: Recall Mr. Hadfield.

HARRY G. HADFIELD

was thereupon recalled as a witness in behalf of the defendant and, having been previously duly sworn, was examined and testified further as follows:

(Testimony of Harry G. Hadfield.)

Direct Examination (Continued)

By Mr. Powers:

Q. I think that I was just asking that question about whether—well, did both policies have the workmen's compensation endorsement on them? A. Yes, sir.

Q. And that workmen's compensation endorsement policy on each policy was the same?

Mr. Rauch: I still feel that the documents are the best evidence.

The Court: That is correct.

Mr. Rauch: I would like to have time enough to look at them before there is anything further done about the documents.

Mr. Powers: I will read these documents to the jury at this time. [104]

Mr. Rauch: I want to see them first, your Honor.

The Court: Let him see them.

Mr. Powers: They are already in evidence.

Mr. Rauch: I am going to object to their going in evidence unless I have a chance to see them.

The Court: He can see them. He wants to examine them at noon, he says.

Mr. Powers: Yes. Well——

"Q. Now, I hand you two drafts marked Defendant's Exhibits, and tell us whether they both contain the same policy number.

(Testimony of Harry G. Hadfield.)

Q. Well, I will call your attention to the fact, Mr. Hadfield, that they do contain different policy numbers on the draft. Now, can you state to the jury why that is?

A. Well, that is due to the——

Mr. Rauch: I still object, your Honor.

The Court: Now, gentlemen, maybe I am the only one here that understands about the policy business, or may be I am [105] the only one that misunderstands. You can correct me if I am wrong. I understand that this man worked for the Union Service Stations until July. He had his first injury in June while he was working for those people.

Mr. Powers: Yes, your Honor.

The Court: During that period Union Service Stations had one of these policies.

Mr. Powers: That is correct.

The Court: Which ran out at the end of June. He began to work in July for the Union Oil Company and during that employment and in November he was hurt, so he says, the second time, which aggravated his prior injury for which he is suing here now, and during that period Union Oil Company had a policy of the same kind and with the same company.

Mr. Powers: That is correct.

The Court: And you claim that these drafts were paid under both of those policies, some

(Testimony of Harry G. Hadfield.)

under one policy and some under another policy.

Mr. Powers: That is correct, your Honor.

The Court: And that is all there is to that now, isn't it?

Mr. Powers: Except that there was some reason why, when they first started paying under the second policy, the Union Oil Company policy, to show why they went back and started charging it up to the first policy again, the operation and the claim from November 5th.

(Further discussion.)

Mr. Powers: Q. Can you state to the jury why that was, whether you had any conversation with the doctor about it?

A. Yes. Dr. Dillehunt informed us that it was a recurrence of July the 11th.

Q. Was that July or June?

A. Or June the 11th, pardon me.

Mr. Rauch: I didn't quite get your answer, Mr. Hadfield.

A. I said Dr. Dillehunt informed us this November 5th injury was a recurrence of the injury of June 11th.

Mr. Powers: Q. And that was the reason two different charges were made there against the different policies? A. Yes."

(Testimony of Harry G. Hadfield.)

(T. P. 134, Line 25, to P. 135, Line 4.) (R. Hunt.)

Q. Now, at any time, whether by the signing of the check or in any manner, did you ever agree with any person to waive your right to claim for injuries to yourself, your body, your person, on account of the accident of November 5th? A. No, I didn't. [106]

(T. P. 182 Line 18 to P. 185 Line 9)

JAMES RALPH HUNT,

the plaintiff, was thereupon recalled as a witness in his own behalf and, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

By Mr. Rauch:

Q. I wish to hand you Defendant's Exhibit 27, that is the insurance policy which Mr. Hadfield stated was the second insurance policy and which was introduced last. I will ask you when you first saw that policy.

A. Yesterday was the first time I saw it.

Q. When it was brought in here?

A. When it was brought in here.

Q. Did you ever discuss that policy with anyone? A. No, sir.

(Testimony of James Ralph Hunt.)

Q. Did you ever agree to accept anything under that policy in consideration of the settlement of your claims against the Union Oil Company? A. No, sir.

Mr. Powers: The instrument speaks for itself, if the Court please.

Mr. Rauch: If the Court please, this has been gone into as partial parol and partially writing.

Q. Now, I want to ask you, as you understood it, as far as you understood it, for what did you accept the drafts that were paid to you marked "Comp." and periods of time, for instance June 1st to June 15th, 1935?

A. I understood those drafts to be payments for the time that I had lost due to my accident and the aggravation of that first injury.

Q. Now, I am referring to the letters which I introduced which stated that you were being paid for your second accident of November 5th, 1934, and ask you if you ever received anything or any draft at any time relating to the second policy which you hold in your hand?

A. No, I didn't.

Mr. Powers: What is the number of that policy?

Mr. Rauch: Q. What is the number you hold? A. 543014. [107]

Q. Did you get something for loss of time on account of your second injury?

(Testimony of James Ralph Hunt.)

A. Yes, I did.

Q. Now, why do you say that you never received anything on account of the second injury in any way relating to or with respect to the second policy? And before you answer I am handing you Defendant's Exhibit 10 and Defendant's Exhibit 11, which are drafts that refer to the accident of November 5th, 1934, and ask you why you say you never received anything under the second insurance policy?

A. I say that because the numbers on the checks refer to different policies.

Q. That money that you received then does not refer to this second policy at all?

A. No, sir.

Q. I want to ask you if you ever in any way, orally or in writing or in any manner, agreed to accept anything in settlement, satisfaction or release under any policy for anything from the Union Oil Company or the Hartford Insurance Company? A. No, sir.

Mr. Powers: He is seeking to change a written document by parol evidence.

Mr. Rauch: Q. When you received those checks marked for the accident of November 5th, 1934, what did you understand you were receiving?

A. I understood I was receiving my time for the accident that happened to me. It was just payment or compensation for time lost.

(Testimony of James Ralph Hunt.)

Q. Lost on account of what?

A. Well, the first injury, and I saw the dates on there and I thought possibly there was a mistake, to the second accident and the aggravation of the first injury.

Q. Did you ever accept any money at any time from this defendant or its insurance company for any other claim than this compensation, for any other claim or for any other reason or thing for this compensation which you state is for time lost due to the operation, the first accident, aggravation of that, and the second accident? A. No, sir.

MR. A. M. RUSSELL

was called by the defendant and testified (T. 143) that he was district service manager for the [108] defendant and was the plaintiff's superior. And T. 148, 149:

"Q. Now, you talked with Mr. Hunt there about an operation and the condition of his back. Did you take it up with Mr. Hadfield?

A. Yes, sir.

Q. And did you ever talk with Mr. Hadfield about that when Mr. Hunt was there?

A. Yes, sir.

Q. And had you talked with Mr. Hadfield before Mr. Hunt got there, over the telephone or anything like that?

(Testimony of A. M. Russell.)

A. On one or two occasions, yes, I had checked by phone with Mr. Hadfield.

Q. And where did you talk with Mr. Hadfield? A. At his office.

Q. And Mr. Hunt was with you over there?

A. Yes, sir.

Q. And what occurred there? What was said at that time?

A. Arrangements were made for the payments of the operation, the hospitalization, and for compensation.

Q. Under the Hartford policy?

A. Under the Hartford's policy. That was our mission to his office.

Q. Did Mr. Hunt say anything about wanting to take those compensation payments and have the operation paid for?

A. Yes, sir, he agreed at that time.

Q. And did he state to Mr. Hadfield there in your presence, the three of you there, how the accident occurred, what it was, what he wanted to be operated on for?

A. Yes, sir, the accident was described.

Q. And what was said about that?

A. I can't give the exact wording. However, we had gone back and covered the case from the beginning, and in our discussions for compensation and all it was discussed with Mr. Hunt as to whether or not he would be acceptable to this arrangement, that he would agree to it, which he did in our presence.

(Testimony of A. M. Russell.)

Q. And was the compensation, the amount that he was to receive, was that figured out there at that time or not?

A. Yes, sir.

Q. And was that figured out the same as is paid by the State?

A. It was on the rate of the State Compensation Law." [109]

EXHIBITS

There was received in evidence, defendant's Exhibit I, which was an application made by plaintiff under date of September 14, 1936, (a year and three months after plaintiff returned to work after his operation) for an accident insurance policy in which he described his duties as "Automobile Filling Station Proprietor or attendant", and in which application the following questions and answers appear, application having been signed by the plaintiff:

"Have you ever at any time received indemnity for accident or illness disability, except as herein stated? Yes. Un. Oil Co. Strained back—June, 1934."

"Have you received any medical or surgical attention within the past two years? (Give details) No."

"Have you ever undergone a surgical operation or has an operation been recommended, except as herein stated? (Give details) For above spinal fusion, full recovery."

DEFENDANT'S EXHIBITS 2, 3, 4 and 5 consist of photographs of the filling station where plaintiff worked and are not pertinent in this appeal.

DEFENDANT'S EXHIBITS 6, 7 and 8 consist of tire irons and a weaver jack, the jack having four small wheels on which it can be rolled, and a long handle which permits the person using the jack to shove it under a car and jack the car up without getting under it. These exhibits, particularly the jack, are difficult to describe and photograph showing the jack and the tire irons is affixed hereto.

DEFENDANT'S EXHIBITS 10, 11, 12, 14, 15, 16, 17, 18, and 19

consist of drafts issued by the Hartford Accident and Indemnity Company to Ralph Hunt, the plaintiff, all of which drafts are endorsed by the plaintiff, Ralph Hunt, and bear "Paid" stamps through several banks and trust companies. On the face and back of each draft there appears substantially the following: [110]

"No. P.C.D. 527264
(Office) Portland, Oregon

To Hartford Accident and Indemnity Company
Hartford, Conn.

San Francisco, Cal. 3/11/35

Pay to the order of Ralph Hunt———$33.34
Thirty-three & 34/100————————/100 Dollars.
Nature of Payment—Comp. 2/25-3/15 Inc. at $3.70nX 53%.
To Hartford Accident and Indemnity Co.
through Wells Fargo Bank & Union Trust Co. San Francisco, Cal.

HARRY G. HADFIELD

Particulars of Claim or Account

Claim number—
Pol. Intl.—US
Policy No.—543012
Date of Accident—11/5/34
Assured—Union Oil Company
Injured or Claimant—Ralph Hunt

The endorsement of this draft constitutes a clear release and receipt in full settlement of the above claim or account."

"The endorsement of this draft by the payee constitutes a clear release and receipt in full settlement of the claim or account stated on the other side.

Endorsements must be guaranteed.

Ink endorsement required.

RALPH HUNT
HELEN HUNT"

(And bank endorsements.)

In the first two drafts referred to above, namely Exhibits 10 and 11, the name "Union Oil Company" appears under the word "Assured", and policy number is given as 543012; date of accident in Exhibit 10 stated as November 5, 1934. Date of accident, Exhibit 11, is stated November 5, 1934, with a line drawn through that date and the date of 6/11/34 written in. The original claim number on this draft, namely 823558 has been marked out by pen and the claim number 817056 inserted. All the other drafts referred to above designate the name of the Union Service Stations as assured and gives the date of the accident as June 11, 1934, using claim number 817056 and policy number 519380. On Exhibit [111] 14 there appears to be a transposition of the policy number and claim number. All the drafts designate under the heading of "Injured or Claimant", Ralph Hunt (plaintiff). On six of the said drafts, the abbreviated word "Comp." appears

before Ralph Hunt's name. On the face of all the above drafts, there appears "Nature of Payment, Comp." The only other difference is the period stated on the face of the draft, which the particular compensation payment covered. These drafts were issued on the following dates and in the following amounts:

3/11/35	$33.34
3/30/35	25.49
April 15, 1935	25.49
May 4, 1935	25.49
May 15, 1935	25.49
June 1, 1935	27.45
June 14, 1935	25.49
7/1/35	23.53
7/11/35	23.53

EXHIBITS 9, 13 and 20

are drafts in the same form as above issued under the following dates:

July 20, 1934, to E. W. Simmons, M.D., $7.50
April 27, 1935, to Emanuel Hospital, $163.35
November 7, 1935, to R. B. Dillehunt, M.D., $414.50.

DEFENDANT'S EXHIBIT 26

is a "Standard Workmen's Compensation and Employer's liability policy" issued by Hartford Acci-

dent and Indemnity Co. to Union Service Stations, Inc., No. US519380, and in force from July 1st, 1933, to July 1st, 1934. The pertinent provisions read as follows:

> "Hartford Accident and Indemnity Company (hereinafter called the company) Does Hereby Agree with this employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom, as follows:
> Compensation
>
> One. (a) To pay promptly to any person entitled thereto under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due,
>
> (1) To such person because of the obligation for compensation for any such injury imposed upon or [112] accepted by this employer under such of certain statutes as may be applicable thereto, cited and described in an endorsement attached to this policy, each of which statutes is herein referred to as the Workmen's Compensation Law, and
>
> (2) For the benefit of such person the proper cost of whatever medical, surgical, nurse, or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral ex-

penses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this policy, while this policy shall remain in force. Nothing herein contained shall operate to so extend this policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached. * * *

"D. The obligations of Paragraph One (a) foregoing are hereby declared to be the direct obligations and promises of the company to any injured employee covered hereby, or, in the event of his death, to dependents; and to each such employee or such dependent the company is hereby made directly and primarily liable under said obligations and promises. This contract is made for the benefit of such employees or such dependents and is enforceable against the company, by any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or proceedings are brought against the company alone or jointly with this employer. * * *

Attached to said insurance policy is a rider designated "Oregon Compensation Endorsement" containing provisions deemed pertinent here as follows:

> "The obligations of Paragraph One (a) of the Policy to which this endorsement is attached, as hereinafter amended, include such Workmen's Compensation Laws as are herein cited and described and none other:
>
> "Sections 6605 to 6659 inclusive, of Title XXXVII, Olson's General Laws of Oregon (1920), as amended by Chapter 311, Laws of 1921, and Chapter 256, Laws of 1923, State of Oregon, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.
>
> "Upon acceptance and delivery of this policy it is agreed that this employer is not subject to the provisions of the above cited Workmen's Compensation Law and will not subject himself thereto while this policy is in force.
>
> "Paragraph one (a) of the policy is amended to read as follows as respects business operations in Oregon: [113]
>
> "One (a) To Pay Promptly and voluntarily to any person who would have been entitled thereto if this employer was subject to such law, and in full compliance with the provisions of such law in the manner therein provided, the entire amount of any sum payable and all installments thereof as they become payable.

(1) To such person the compensation provided by such law for any such injury;

(2) For the benefit of such person the proper cost of whatever medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral expenses are included in the provisions of such Workman's Compensation Law.

"It is agreed that all of the provisions of such Workmen's Compensation Law shall be and remain a part of this contract as fully and completely as if written herein as a measure of the compensation or other benefits for any personal injury or death covered by this policy while this policy shall remain in force. Nothing herein contained shall include within the provisions of this amendment any Workmen's pensation Law, scheme, or plan other than as above cited.

"This is a contract between the Company and this employer for the benefit of any employee covered by this policy who receives an injury for which he would be entitled to compensation under the provisions of such law if this employer was subject thereto. It is the purpose hereof to provide voluntarily such compensation to such injured employees as will accept it in lieu of all other claims or demands because of such injury. In the event of such

injury the Company will offer to pay to the injured, or to his dependents if the injury results in death, all the benefits provided by such Workmen's Compensation Law, payable in the manner therein provided. If the injured employee refuses or neglects to accept the payment so offered or make an agreement respecting subsequent payments whether offered in the form of a legal tender or not, such refusal or neglect shall be considered as a rejection of the voluntary undertakings herein set forth, and thereafter such voluntary undertakings shall be withdrawn. Thereupon the Company will remain obligated to this Employer as respects such injured employee only in accordance with the undertakings of Paragraph One (b) of the policy and the other undertakings of the policy related thereto. The earned premium under this policy shall not be affected by any such rejection on the part of any injured employee or his dependents.

"If such injured employee or his dependents accept the first payment on account of compensation, he or they shall at that time execute a general release relieving this Employer and the Company from all further obligation because of such injury except the obligation for compensation in manner and form as agreed. The Company shall continue the payment of the installments of compensation as the law provides until such time as disability shall cease or

other conditions shall arise which according to the provisions of such law would operate to terminate the compensation payments. [114]

"If compensation payments are to be terminated for the reason that disability has ceased, and the injured employee and the Company cannot agree with respect to the date upon which such payments shall terminate, then the question shall be submitted to medical arbitration. The Company and the beneficiary shall each appoint one competent duly licensed physician and surgeon, and if these two are unable to agree, these arbitrators shall call in a third competent and duly licensed physician and surgeon. * * * The findings of two of the medical arbitrators shall be final as respects the termination of disability. The beneficiary and the Company shall each pay his or its physician and surgeon and shall divide equally the expense of the third physician and surgeon if called.

"The premium rates stated in the policy are the full premium requirements for the hazards undertaken by the Company, and the Company will not claim or demand any contribution by the employees of this Employer who are covered by this policy either in accordance with the provisions of such law or in any other way. All provisions in this policy respecting premium or the method of computing or adjusting the

same are direct contracts between this employer and the Company and without effect upon the employees covered hereby."

DEFENDANT'S EXHIBIT 27

consists of a renewal policy of insurance identical in form as defendant's Exhibit 26, issued by the same insurance Company to Union Oil Company, its allied and subsidiary companies, as employer, Policy No. 543014, covering period from June 30, 1934, to June 30, 1935.

DEFENDANT'S EXHIBIT 33

consists of a surgeon's report to the Hartford Accident and Indemnity Company by Dr. R. B. Dillehunt under date of May 17, 1935, reading as follows:

"Important—This report is necessary in relation to compensation to be paid.

1. Name of employer—Union Oil Co.
2. Name of person injured—Ralph Hunt
3. Date of injury—June 12, 1934
4. Is patient able to work?—No
5. When in your opinion will he be able to work?—About July 15, 1935
6. Please state present condition of injured and treatment.—Lumbo Sacral fusion operation March 1, 1935, for chronic lumbro-sacral lesion.

Now in brace. Up and about. No pain. About June 15th will remove brace and start gentle movement." [115]

And a similar report dated July 10, 1935, reads as follows:

"1. Name of employer—Union Oil Co.

2. Name of person injured—Ralph Hunt

3. Date of injury—June 22, 1934

4. Is patient able to work?—Yes

5. When in your opinion will he be able to work?—June 24, 1935.

6. Please state present condition of injured and treatment.—Recovered."

And surgeon's final report and bill for operation on plaintiff for lumbosacral strain and lumbosacral fusion, which states that the plaintiff entered the hospital Feb. 28, 1935; discharged from hospital April 20, 1935; able to return to work June 24, 1935; total $414.00.

DEFENDANT'S EXHIBIT 35

consists of a certificate from the Corporation Commissioner of the State of Oregon showing that the Union Service Station, Inc., had withdrawn from doing business in the State of Oregon, that said corporation had been dissolved and its assets and properties taken over by the Union Oil Company and its liabilities assumed by the Union Oil Company.

PLAINTIFF'S EXHIBITS 22 and 23

consist of transmittal letters on Hartford Accident and Indemnity Company stationery signed by Harry G. Hadfield, Claim Adjuster, addressed to plaintiff, and refer to plaintiff's injury, November 5, 1934.

These letters written under date of March 11 and March 30, 1935, both read as follows except as to the amount being paid and the period covered by the compensation paid: [116]

> "We enclose herewith our draft #527264 in the sum of $33.34 covering compensation for the period from February 25th to March 15 inclusive; also receipts to cover, which we will ask you kindly to sign, have your signature witnessed and return to us at your early convenience.
>
> "A return envelope is provided for your use.
>
> "Yours very truly, Harry G. Hadfield, Claim Adjuster."

He received all his drafts by mail and they were transmitted under letter similar to the above exhibits.

PLAINTIFF'S EXHIBITS 41 to 55, INCLUSIVE,

consist of applications made by the plaintiff to Maccabees for disability payments, said exhibits being

on the same form and were made weekly covering a period of sixteen weeks thereafter. These are all signed by Dr. R. B. Dillehunt as surgeon, or his associate Dr. F. S. Lucas. They designate the plaintiff's condition as a lumbosacral strain and state the probable cause of sickness as "Injury—June 13-34". In some of these reports the plaintiff's condition is described as a lumbo sacral strain severe. The reports indicate that the disability payments claimed were paid by the Maccabees. These reports and exhibits do not relate to the compensation payments made by the Hartford Accident and Indemnity Company. [117]

NARRATIVE STATEMENT OF ISSUES.

Plaintiff filed his complaint under date of May 16, 1936, seeking to recover for an injury to his back, which he alleged he sustained on June 12, 1934, while working with a tire iron and for a second injury of November 5, 1934, which allegedly aggravated the prior injury. This action was brought against his employers, the Union Oil Company and the Union Service Stations, Inc. It was alleged the defendants ordered the plaintiff to resume his work after his first injury and while he was in a debilitated condition and physically unable to do so and as a result thereof an accident occurred on November 5, 1934, while he was engaged in operating an automobile jack under a car, which resulted in an aggravation of his prior injury.

Several motions were made and amended complaints filed. Finally the second amended complaint was filed and several of the early allegations were dropped from the complaint, and counsel for plaintiff stated in open court that he was going to rely on the alleged accident and injuries sustained November 5, 1934, and on aggravation of injury as far as the accident of June 12, 1934, is concerned. Thus there was dropped from the complaint any claim to recover for the original accident of June 12th and any right to recover on the theory of the defendant's having required the plaintiff to work when he was physically unable to do so. It was alleged in the original complaint filed that the Union Oil Company had rejected the State Compensation Act as of July 1, 1934. The case proceeded to trial against both the defendants, namely: The Union Oil Company and Union Service Stations, Inc., and during trial upon a showing by a certificate from the Corporation Commissioner of the State of Oregon, that the defendant Union Service Stations, Inc., had dissolved and ceased to do business as of July 1, 1934, and that the Union Oil Company had assumed the assets [118] and liabilities of said Union Service Stations, Inc., the Court entered an order dismissing the Union Service Stations, Inc., from the case. The trial then proceeded against the Union Oil Company as sole defendant. There were allegations in the complaint charging the defendant with having violated the employer's liability act of

the State of Oregon and also an allegation seeking to recover punitive damages from the defendant. Upon motion of the defendant during the trial the Court ruled that the action did not fall within the terms of the employer's liability act and that there was no showing made which would entitle the defendant to punitive damages and orders were entered accordingly. The case continued as a simple common law action for negligence by an employee against his employer. At the conclusion of the case defendant made a motion for a directed verdict under the evidence in the case chiefly on the grounds that the plaintiff could not recover because he had assumed as a matter of law such risk and danger, if any there was, in doing the work he was engaged in at the time of the injury, namely, using a small Ford automobile jack, which jack belonged to the plaintiff himself and on the grounds the plaintiff had been compensated for the same injury and had agreed to take and had taken compensation payments from the defendant's insurance carrier under an employer's liability insurance policy containing a workmen's compensation endorsement which entitled him to all of the benefits of the State Workmen's Compensation Act and to receive payments thereunder in the same amounts as prescribed by the said workmen's compensation act. These matters had been alleged in defendant's answer. No reply was filed by plaintiff. Plaintiff's charge of negligence as finally simmered down was that the de-

fendant had failed to furnish him with a safe and proper jack and also had failed to furnish him with an able bodied assistant. [119] Plaintiff in his testimony admitted receiving compensation payments but took the position that he had never seen the policy of insurance under which these payments were made and that he did not understand that by accepting these payments, he would be barred from also suing his employer for his injuries. The Court denied defendant's motion for a directed verdict and submitted the case to the Jury, and after the Jury's verdict had been rendered, reconsidered the motion for a directed verdict together with a motion made by the defendant to set aside the verdict and judgment and for a new trial and on March 7, 1939, entered an order denying both of said motions rendering a memorandum opinion.

During the course of trial, defendant moved the Court for an order to take from the Jury plaintiff's claim that his action fell within the Employer's Liability Act of the State of Oregon. The Court granted defendant's motion, in this respect, making an oral order from the bench. Defendant's motion and the Court's ruling thereon made in open Court are as follows:

"DEFENDANT'S MOTION FOR NON-SUIT

"Mr. Powers: Comes now the defendant and moves the Court for a judgment of invol-

untary non-suit on the grounds and for the reasons that, first, that the plaintiff has shown no right to relief; second, that it now affirmatively appears from the evidence and testimony in the case that the plaintiff has changed his cause of action from one in tort to one in contract, and that he has received compensation payments for the same injuries which he now seeks to recover for in this action, and that he has been paid for those same injuries; that if he has a claim at all he would have a claim under the insurance policy; third, that it appears from the evidence that the question of whether the Employer's Liability Act is applicable is one of law for the Court to determine now from the evidence, inasmuch as it is shown that the plaintiff bases his claim to come under the Employer's Liability Act on the ground or upon the theory that he was not able to do the work, he was not able to lift the jack in and out of his car or he could have taken it along, he was not able to get around and do the work as an able bodied man would have done in getting under the car. The next ground is that there is no evidence in this case to be submitted to the Jury; that it appears that the Employer's Liability Act does not apply as a matter of law and that therefore the common law negligence is applicable and that no evidence here shows any negligence at all on the

defendant for any common law liability. If [120] there was anything here in the way of overexertion or an assumption of risk, that is a defense to this action under any common law theory.

(The motion was argued pro and con at length by respective counsel, following which an adjournment herein was taken until Tuesday, December 20, 1938, at 10:00 o'clock A. M., at which time Court reconvened and the Court ruled as follows:)

The Court: I don't know whether I am privileged to say I have prayerfully considered the matter, but I have carefully considered the matter which was presented yesterday, and I can only say that I don't feel at liberty to attempt to distinguish this case from the Ridley case. So the matter will proceed as a common law action from here on. The motion to dismiss will be denied.

Mr. Powers: With the usual exception allowed, your Honor?

The Court: Exception allowed."

At the conclusion of the case the Court instructed the Jury and proceedings were had in connection with the instructions as follows:

"CHARGE OF THE COURT.

"The Court: Gentlemen, the case has boiled itself down to a fairly simple issue. I believe

I can state it to you briefly. I want to take the blame myself for dragging the case out a bit longer than it should have gone, but there were some questions that were solely for my consideration, and I am sorry to say I was a bit slow in making up my mind about it.

"But now what we are dealing with is the alleged accident in November; we are dealing with that solely and alone in determining the liability of the defendant. Was there an accident of the sort the plaintiff claims occurred when he went out to change the tire in his car. He had had a prior injury to his back in June, which is not disputed, but that is not what we are trying. We are trying the alleged accident in November. The accident in June comes into the case merely as explaining how he happened to have a bad back, and what he is claiming is damages for aggravation to the back condition which first became acute back there in June.

"The plaintiff, like in all cases, has the burden of proving his charge of liability against the defendant. He must satisfy you by a preponderance of the evidence, which means the greater weight of the evidence, that the things that are necessary for him to prove have been proved.

"Now, every employer has the duty of providing reasonably safe and adequate tools for

his employees to work with, and that is the charge the plaintiff has made against the defendant in this case, that reasonably safe and adequate tools were not provided for this tire changing. Now, that is for you to [121] decide, whether the defendant's conduct did not come up to that standard of its obligation as an employer. If you are satisfied by a preponderance of the evidence that the defendant did not provide reasonably safe and adequate tools for this work and that the plaintiff was injured as he claims, and that the failure to provide these tools was the proximate cause of his injury, which means the direct cause, then the plaintiff has established his claim as against the defendant. But that does not mean that even though you are satisfied of that that the plaintiff is entitled to recover. The defendant has pleaded three defenses. It has pleaded, first, contributory negligence by the plaintiff. Even though you should feel on account of this opening statement that I have made to you that the defendant had failed in its duty, if you should further find that the plaintiff was guilty of contributory negligence which proximately contributed to this injury, the plaintiff could not recover.

"Now, negligence in the law is that conduct of the sort which is either the doing of a thing which the average reasonable man or the ordi-

narily prudent man, as we put it sometimes, would not do under the same circumstances, or the failure to do what the average reasonable man would do. And so you must test the plaintiff's own conduct by those standards. If his own conduct under the circumstances was not that of the average reasonable man and that contributed proximately to the accident, he could not recover.

"Just as the plaintiff has the burden of proving the defendant's failure to come up to the standard the law imposes on it, so in considering contributory negligence the burden of proof is on the other side. You must be satisfied as to that by a preponderance of the evidence offered in the defendant's behalf in that respect.

"Now, passing that, the defendant has pleaded another defense, as it is allowed to by law in cases of this kind, called assumption of risk. Ordinarily that is stated this way, that an employee assumes those risks of his employment that he knows and appreciates, and so in this case. As to that I may say the defendant also has the burden of proof, and if you should feel that the defendant has satisfied the burden of proof as to that and that this risk which went with the use of this jack and changing the tire in this particular way was a danger or risk of the kind that the plaintiff knew and that he

appreciated and understood, he would not be entitled to recover.

"The third defense that the defendant has pleaded and that you have heard a good deal about is that he has been paid for his accident and his injury and that he has given a release and that this is in discharge of all obligation the defendant might have ever had to him or that anybody might have ever had to him on account of the alleged injury. Now, you have here some checks and you have some insurance contracts and there has been testimony from the witness stand supplementing that on both sides, and I leave all of that to you gentlemen of the jury to determine as a question of fact. As to that the defendant has also the burden of proof, and the question for you to decide is whether the plaintiff considered and understood these payments that were made to him as in complete release and discharge of all obligations and all liability growing out of the accident from the [122] defendant or from the insurance company. By that I mean obligation on anybody's part. The plaintiff's theory is that he felt he was just being paid for the loss of his time. The defendant's theory is that——I am sure I can't state it as well as Mr. Powers has stated it for his client, but in brief that they have paid this plaintiff all that he would have gotten under the Workmen's Com-

pensation Law of Oregon had this company under this Act, which it happened not to be, and that the plaintiff knew that this company had that sort of an arrangement with the insurance company and that before he accepted the medical services and surgical care and the sums that were paid him thereafter, that they had an understanding with him that was in full payment and discharge of all claims against them. If that should be your conclusion under all of the evidence, the plaintiff cannot recover. On the other hand, if your feeling should be that the plaintiff did not understand it that way and that he felt these payments were just for his loss of time and not for these other elements for which he is now suing, then that would not be a defense.

"Now, should you feel that the plaintiff is entitled to recover, he would be entitled to reasonable compensation for his pain and suffering and, in general, such amount as would compensate him for his injury, what has gone before in the way of pain and suffering and for any permanent consequences, should you find that his injury is of a permanent nature, pain and suffering in the future or impaired earning capacity, but in dealing with that question, if you do proceed that far in your deliberations, you must not be controlled by passion or prejudice, but just deal with the cold facts of the

situation. And in any comment that I have made about the amount that he would be entitled to recover, should you find for him, you are not to understand that I am expressing any view as to defendant's liability or that plaintiff is entitled to recover from the defendant.

"You are the sole and exclusive judges of the credibility of the witnesses and of the weight and value of their testimony. A witness wilfully false in one part of his testimony is to be distrusted in other respects.

"In this court a unanimous verdict is necessary. When you retire you will elect a foreman, who will sign the verdict for you. You will be given two forms of verdict, one a verdict for the defendant, should you find for the defendant, and one a verdict for the plaintiff with the amount of the damages to be filled in, should you find for the plaintiff. You will take with you to the jury room the exhibits, and give them full consideration along with the testimony that you have heard from the witness stand.

"Now I will ask you gentlemen to just remain in your seats a few minutes while I join the attorneys in my chambers, and the reporter.

"(The Court, counsel and the court reporter thereupon repaired to the Court's

Chambers, where the following occurred without the presence of the jury:)

"The Court: Now if you will speak up first, Mr. Rauch.

"Mr. Rauch: We have no objections. [123]

"Mr. Powers: I will object to the Court's instruction with respect to the insurance policies, leaving to the jury the question of what the contract and the other documents are, to construe the agreement. My position is that it is for the Court to construe the written documents.

"On the question of damages, as I understood it there in instructing on the damages, I want to except to the instruction on damages as given for the reason that it did not refer to the first accident, and tell the jury that he could not recover anything for that first accident, my theory being, of course, that it was a continuing accident and there could be no recovery for any condition that he had prior to November 5th, when he says he had the second accident.

"I also take an exception to the Court's failure to give an instruction that nothing could be allowed in this case under the insurance policies themselves, which are in evidence solely for the purpose of being submitted to the jury under the instructions given to them by the Court in determining whether justice had been made.

"And with respect to those insurance policies, I except to the Court's failure to give defendants' requested instruction that the contract or settlement leading up to the release included only the payments that have been made to date, because one of the considerations for the release is that all compensation payments will be made under that insurance policy and the insurance policy so provides, and it provides for additional compensation under the policies if there is any partial permanent disability, but before any award can be made in that regard there must be a medical arbitration.

"And I think that we should have an instruction in this case along the lines requested in defendant's requested instructions that a man is only entitled to be compensated for his injuries only once; he isn't entitled to a double compensation for the same injuries. Now, I don't know what to say about the payments that have been made in the case. It appears that there has been paid to the plaintiff and for his benefit something in the neighborhood of——I haven't the complaint here, but over $750.00, seven hundred and fifty or some such amount, and the evidence shows that that was paid after the alleged second injury. It seems to me the jury ought to be instructed in that regard some way. I haven't requested one, so—my theory there, of course, is that without a tender back

into Court for the mistake, or, if there was a mistake, if he didn't understand it that is a mistake of a fact, and he has to come in and specify that and plead it affirmatively and tender the money back into court, and that he has not done.

Mr. Rauch: I have just one suggestion——are you through, Mr. Powers?

"Mr. Powers: Yes, that is all of mine.

"Mr. Rauch: I think it would perhaps be wise to make a statement to the jury that the claim for punitive damages has been withdrawn. [124]

"The Court: Of course, they won't see the pleadings.

"Mr. Rauch: I see. Then it ought not—the verdict does not specify anything about it, so that it is perhaps——

"The Court: There is no need to put the idea in their minds, I don't think. Thank you gentlemen very much.

"(Thereupon, the Court, counsel and the court reporter returned into the courtroom, where the following occurred within the presence of the jury:)

"The Court: I intended to make it plain to you gentlemen, but if not I will restate it, that even though you should find for the plaintiff no claim can be made for the first accident in June. We are dealing solely with the acci-

dent in November, and the damages, if any, allowed to the plaintiff can only be for damages that occurred from that second accident by way of aggravation of his then existing condition, such as you might find it to be. Also, this is not in any sense a suit on the insurance policies or any of them that have been referred to here. This is what we call a tort action. It is an action for negligence, and it is based entirely on the theory of failure on the part of the employer to provide reasonably safe and adequate tools.

"I don't want to confuse you about the insurance feature of the case. It is defendant's theory that plaintiff is entitled to recover only under the insurance policies; that he made himself a party to the policies by accepting those payments and giving the releases, and that he still has some further claim, possibly might still have some further claim under the policies if he accepted that in lieu of it and made himself a party to the policies. In short, that even though he still had some permanent partial disability, that he would have claims under the policies in the way provided by the policies, that is, arbitration by medical men as to whether he did have further injury and the extent of it. But, as I said to you before, the plaintiff wholly rejects that theory that he ever made himself a party to the insurance policies and bases his claim on the alleged negligence through failure

to provide safe and adequate tools, so he claims; not claiming, however, any damages for the loss of time, because he treats the sums that were paid him as payments for that.

"In general as to damages, the plaintiff in this kind of a case can only be paid, if damages are allowed him, for his actual damages, whatever the extent his hurts have really in fact damaged him either in the past or as that damage may continue in the future. That is all for you to consider and pass on, not to exceed the maximum sum of $35,000.00 which is asked for in the complaint.

"Will you swear the bailiffs.

"(Thereupon, the bailiffs were sworn.)

"The Court: Mr. Powers and Mr. Rauch, will you come here a minute, please?

"(The Court, Mr. Powers and Mr. Rauch, here conferred privately.) [125]

"The Court: Gentlemen of the jury, only the Union Oil Company remains as the defendant in the case, and the lawyers at my suggestion have just scratched out the other company which in the beginning was joined as a defendant.

"Now you may retire, and thank you all.

"(Thereupon, at 4:35 o'clock P. M., the jury retired to consider of their verdict, and the following occurred without the presence of the jury:)

"The Court: Mr. Powers, you and Mr. Rauch are entitled to further objections, I take it, to what I have just told the jury since we came in, if you have such objections.

"Mr. Powers: No further objections or exceptions on my part, your Honor.

"Mr. Rauch: No further objections, your Honor.

"The Court: Gentlemen, will a sealed verdict be acceptable?

"Mr. Rauch: Yes, your Honor.

"Mr. Powers: It will be, your Honor."

APPELLANT'S DESIGNATION OF POINTS ON APPEAL.

1. Plaintiff as a matter of law assumed the risk and danger of being injured. Plaintiff's injury came about while he was using his own ordinary automobile jack and any risk and danger in so doing was incidental to his employment and was fully appreciated by the plaintiff.

2. Plaintiff having been injured while using an ordinary simple tool, the Court erred in instructing the Jury that defendant had duty of furnishing the plaintiff with safe and adequate tools for tire changing.

3. Plaintiff not having raised any issue of mistake or fraud, Court should have ruled as a matter of law that plaintiff in accepting compensation for the same injury, reached an accord and satisfaction with his employer's insurance carrier, and, having

been paid compensation therefor by said insurance company, plaintiff released his claim for tort against his employer and changed his original cause of action from one in tort to one of contract, [126] and that plaintiff, by his actions and in accepting compensation payments and other benefits from his employer's insurance carrier, made an election to take compensation payments under the workmen's compensation endorsement contained in his employer's policy and could not receive and retain the fruits and benefits of this contract and still maintain an action against his employer for the same injury for which he was paid. Under the law an injured person is not allowed to split his demands and causes of action and is not entitled to double compensation for same injury.

4. In failing to hold that the endorsement on the back of the compensation drafts constituted a release for plaintiff's alleged injury.

5. The Court should have construed the written documents and the legal effect thereof and instructed the Jury accordingly rather than to submit the written documents, namely, the insurance policies and drafts to the Jury to construe the legal rights of the respective parties thereunder.

6. Assuming it was proper to submit issue to Jury, Court should have instructed Jury to reduce pro tanto from any recovery the amount already received by plaintiff by way of compensation payments and payments made for his benefit for medical expense.

7. In failing to instruct the Jury that a man is only entitled to be compensated for his injuries once and is not entitled to double compensation for the same injuries.

In compliance with Rule 75 of the Rules of Civil Procedure there has been placed and filed with the Clerk of the District Court, the original and one copy of the Court Reporter's transcribed evidence taken during the trial, which contains all evidence of witnesses deemed pertinent by the appellant to the points raised on appeal. Also there has been placed and filed [127] with said Clerk two copies of the instructions of the Court and proceedings had in connection therewith and defendant's motion for non-suit and the Court's ruling thereon, all of which have been certified to by the Court Reporter.

JAMES ARTHUR POWERS
Attorney for Defendant Appellant [128]

Dated this 22nd Day of August, 1939.
Portland, Oregon.

It is understood and agreed by and between the parties hereunto, appellant, by and through its attorney, James Arthur Powers, and appellee, by and through his attorney, George L. Rauch, that the Condensed Narrative Statement of Material Evidence; Material Portions of Exhibits; Issues Raised During Trial; and Points Designated on Appeal to which this stipulation is attached, constitutes a narrative

statement which together with those portions of the evidence which is contained therein in question and answer form, constitutes and contains all that portion of the transcript of evidence and other proceedings had during trial upon which either and both of the parties hereunto will rely upon this repeal.

UNION OIL COMPANY OF CALIFORNIA, a corporation, appellant,

By JAMES ARTHUR POWERS
Attorney

JAMES RALPH HUNT,
appellee,

By GEO. L. RAUCH
Attorney

[Endorsed]: Filed August 22, 1939. [129]

CLERK'S CERTIFICATES.

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 129 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered L-12711, in which James Ralph Hunt is plaintiff and appellee, and Union Oil Company of California is defendant and

appellant; that said transcript has been prepared in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is $24.00 and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 23d day of August, 1939.

[Seal] G. H. MARSH,
Clerk [130]

[Endorsed]: No. 9277. United States Circuit Court of Appeals for the Ninth Circuit. Union Oil Company of California, a corporation, Appellant, vs. James Ralph Hunt, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Oregon.

Filed August 28, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9277.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellant,

vs.

JAMES RALPH HUNT,

Appellee.

CONCISE STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY TO BE PRINTED FOR THE CONSIDERATION OF THIS APPEAL.

APPELLANT'S DESIGNATION OF POINTS ON WHICH IT INTENDS TO RELY ON APPEAL.

1. Plaintiff as a matter of law assumed the risk and danger of being injured. Plaintiff's injury came about while he was using his own ordinary automobile jack and any risk and danger in so doing was incidental to his employment and was fully appreciated by the plaintiff.

2. Plaintiff having been injured while using an ordinary simple tool, the Court erred in instructing the Jury that defendant had duty of furnishing

the plaintiff with safe and adequate tools for tire changing.

3. Plaintiff not having raised any issue of mistake or fraud, Court should have ruled as a matter of law that plaintiff in accepting compensation for the same injury, reached an accord and satisfaction with his employer's insurance carrier, and, having been paid compensation therefor by said insurance company, plaintiff released his claim for tort against his employer and changed his original cause of action from one in tort to one of contract, and that plaintiff, by his actions and in accepting compensation payments and other benefits from his employer's insurance carrier, made an election to take compensation payments under the workmen's compensation endorsement contained in his employer's policy and could not receive and retain the fruits and benefits of this contract and still maintain an action against his employer for the same injury for which he was paid. Under the law an injured person is not allowed to split his demands and causes of action and is not entitled to double compensation for same injury.

4. In failing to hold that the endorsement on the back of the compensation drafts constituted a release for plaintiff's alleged injury.

5. The Court should have construed the written documents and the legal effect thereof and instructed the Jury accordingly rather than to submit the written documents, namely, the insurance policies

and drafts to the Jury to construe the legal rights of the respective parties thereunder.

6. Assuming it was proper to submit issue to Jury, Court should have instructed Jury to reduce pro tanto from any recovery the amount already received by plaintiff by way of compensation payments and payments made for his benefit for medical expense.

7. In failing to instruct the Jury that a man is only entitled to be compensated for his injuries once and is not entitled to double compensation for the same injuries.

DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY TO BE PRINTED FOR THE CONSIDERATION OF THIS APPEAL.

All of the record as prepared by the Clerk of the District Court and docketed in this Court in connection with the appeal herein, which record consists of one hundred twenty-nine pages in all, except pages contained therein of 55 to 66 inclusive, and except pages beginning in the middle of Page 68 with the testimony of Ernest H. Coats to Page 77 inclusive, omitting unnecessary titles.

JAMES ARTHUR POWERS
Attorney for Appellant.

P. O. Address:
James Arthur Powers
Attorney at Law
610 American Bank Building
Portland, Oregon

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, on this 24th day of August, 1939.

GEO. L. RAUCH
Attorney for Appellee.

[Endorsed]: Filed Aug. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

WRITTEN DESIGNATION OF ADDITIONAL PARTS OF RECORD WHICH APPELLEE THINKS MATERIAL AND DESIGNATES TO BE PRINTED.

Comes now James Ralph Hunt, Appellee, herein and designates all of the record as prepared by the Clerk of the District Court and docketed in the above entitled court in the matter of the appeal herein as material and necessary for the preparation of his defense; Appellee specifically designates all those parts of the record herein which have been excepted and omitted by appellant in its designation as those additional parts of the record which Appellee thinks material and requests the Clerk of the Honorable Circuit Court herein to print the same, that is, to print the entire record, including those portions omitted in appellant's designation,

to-wit: Pages 55 to 65 inclusive and all of pages 66 to 77 inclusive.

GEO. L. RAUCH
Attorney for Appellee.

[Endorsed]: Filed Aug. 28, 1939. Paul P. O'Brien, Clerk.

No. 9277

United States
Circuit Court of Appeals
For the Ninth Circuit /3

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JAMES RALPH HUNT, *Appellee.*

Brief of Appellant

Appeal from the District Court of the United States
for the District of Oregon.

JAMES ARTHUR POWERS,
Attorney for Appellant.

GEO. L. RAUCH,
Attorney for Appellee.

TABLE OF CONTENTS

PAGE

JURISDICTIONAL STATEMENT 1

STATEMENT OF CASE AND SUMMARY OF LAW 2

THE ISSUES 13

BRIEF SUMMARY OF LAW POINTS 19

SPECIFICATION OF ERROR NO. 1 20

An Employee as a Matter of Law Assumes Ordinary Risk of Employment 20

An Employee Creating His Own Working Conditions Assumes the Risk Thereof 30

An Employee Using His Own Tools Assumes the Risk Thereof 31

An Employee Who Has Comparative or Equal Knowledge With His Employer Is Held to the Assumption of Risk Doctrine 33

If Plaintiff Undertook Work Beyond His Physical Capacities He Is Not Entitled to Recover 36

SPECIFICATION OF ERROR NO. 2 38

An Employee as a Matter of Law Assumes the Risk of Using Simple or Ordinary Tools 38

SPECIFICATION OF ERROR NO. 3 46

Plaintiff Made an Election to and Did Accept the Compensation Benefits as Provided in the Insurance Policy Which Was the Exercise of a Remedy Inconsistent With Present Action 47

Compensation Payments as Measured and Prescribed by the State Act Constitute Satisfaction and to Allow Further Recovery for Same Injury Violates Rule Against Double Compensation 53

TABLE OF CONTENTS—Continued

PAGE

Plaintiff Exchanged His Tort Action for One in Contract And This Constitutes Satisfaction 57

Plaintiff Having Changed His Cause of Action From One in Tort to One in Contract, in the Absence of Pleading and Proving Fraud or Mistake He Will Not Be Relieved of the Obligations Imposed Upon Him Under the Contract 58

Injured Person Not Allowed to Split His Demand or Cause of Action 60

SPECIFICATION OF ERROR NO. 4 63

In Failing to Hold That the Endorsement of the Compensation Drafts and Retaining the Fruits of the Contract Constituted a Release of Plaintiff's Claim For His Alleged Injury 63

SPECIFICATION OF ERROR NO. 5 69

Court's Duty to Construe Legal Effect of Written Documents..... 69

SPECIFICATION OF ERROR NO. 6 72

Defendant Entitled to Have Verdict Reduced Pro Tanto in Amount Paid Plaintiff 72

CONCLUSION 73

INDEX OF CASES

PAGE

Anderson v. Hartford Accident and Indemnity Co., 152 Or. 505; 53 P. (2) 710; 54 P. (2) 1212 ..... 47, 53, 70, 71

Bevin v. Oregon-Washington R. & Nav. Co., 136 Or. 18; 298 P. 204; (1931) certiorari denied, 284 U. S. 639 21

Burleson v. Langdon, 174 Minn. 264, 219 N. W. 155 58

Christie v. Great Northern Railway Co., 142 Or. 321, 20 P. (2d) 377 (1933) 21

City Timson v. Powers, 119 S. W. (2d) 145; Tex. 30

Davis v. H. P. Cummings Construction Co., 129 Atl. 729; 82 N. H. 87 ..... 63, 64

Dinuhn v. Western N. Y. Water Co., 297 N.Y.S. 376; 252 App. Div. 51 30

Fellows v. Stevens, 170 Mich. 13; 132 N. W. 1047; 135 N. W. 823; 39 C. J. 621 31

Ferretti v. Southern Pacific Co., 154 Or. 97; 57 P. (2d) 1280 (1936) 21, 22, 37

Florida East Coast Ry. Co. v. Thompson (Florida 1927), 111 So. 525 65

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1, 7 P. (2d) 796 (1932) 21, 24, 32, 40

Gibbs v. Redman Fireproof Storage Co., 68 Utah 298, 249 P. 1032 58

Globe & Rutgers Fire Co. v. Cleveland, 34 S. W. (2d) 1059, 1060 (162 Tenn. 83) 60

Hagermann v. Chapman Timber Co., 65 Or. 588; 133 P. 342 ..... 33, 34

Hamilton v. St. Louis, K. & N. W. R. Co., 118 F. 92 ..... 63, 67

Harkins v. Standard Sugar Refinery, 122 Mass. 400 31

Hartz v. Shaefer, 154 Atl. 713; 303 Pa. 449 (1931) 31, 32

Holmes v. Henry Jenning & Sons, 7 F. (2d) 231 ..... 47, 50, 53

Hunt, Accord & Satisfaction, Sec. 2, P. 5 58

Hunt on Accord & Satisfaction, Sec. 42 ..... 60, 62

INDEX OF CASES—Continued

PAGE

Ierardi v. Farmers Trust Co., 151 Atl. 822 (Del) 60, 62

Ingram v. Carlton Lumber Co., 77 Or. 633 (152 P. 256) 60, 73

Kidd v. Hillman, 58 P. (2d) 662 (14 Cal. App. (2) 596) 60

Kight v. Orchard-Hays, 128 Or. 668, 275 P. 682 ..... 58, 59

King v. Union Oil Co., 144 Or. 655, 24 Pac. (2) 345 ..... 47, 49

MacDonald v. Hornblower & Weeks, 268 Mich. 626, 256 N. W. 572 58

Mandeville v. Jacobson, 189 Atl. 596 (Conn. 1937), 598 73

Matheny v. Edward M. & S. Ice Co., 39 F. (2d) 70 53

McDonaugh v. National Hosp. Ass'n., 134 Or. 451 (294 P. 351) 53, 54

McEachin v. Yarborough, 74 S. W. (2d) 228; 189 Ark. 434 (1934) 33, 34

Middleton v. Faulkner, 178 So. 583; 180 Miss. 737 ..... 38, 44

Middleton v. National Box Co., 38 F. (2d) 89 ..... 38, 43

Myhra v. Park, 258 N. W. 515 (193 Minn. 290) 60

Northwestern Pacific R. Co. v. Feilder, 52 F. (2d) 400 ..... 21, 23

O'Donnell v. Clinton, 145 Mass. 461 (14 N. E. 747) 53, 57

Otis v. Pennsylvania R. R. Co., 71 F. 136 ..... 63, 67

Owen v. Elliot Hospital, 136 Atl. 133; 82 N. H. 497 (1927) 33

Parker v. Norton, 143 Or. 165, 21 P. (2d) 790 ..... 20, 26

Phillips v. Keltner, 124 S. W. (2d) 71; 276 Ky. 454 30

Robb v. Vos, 155 U. S. 13 47

Roles Shingle Co. v. Bergerson, 142 Or. 131 (19 P. (2d) 94) 47, 49

Spain v. Powell, 90 F. (2d) 580 ..... 38, 41

Sunlight Coal Co. v. Floyd, 26 S. W. (2d) 530 (233 Ky. 702) (Ky. 1930) 63, 65

INDEX OF CASES—Continued

PAGE

Thompson v. Pennsylvania Railroad Company, 88 F. (2d) 148 ..... 21, 27

Thornton v. Puget Sound P. & L., 49 F. (2d) 347 ..... 63, 64

Upton v. Tribilcock, 91 U. S. 45, 50 (23 L. Ed. 203) 58, 59

Walker v. Ginsburg, 244 Mich., 568; 222 N. W. 192 ..... 21, 26

Wheeloch v. Freiwald, 66 F. (2d) 694 ..... 21, 23

Weeklund v. Southern Oregon Co., 20 Or. 591; 27 P. 260 ..... 33, 34

Williams v. Adams, 91 S. W. (2) 951 (Tex) (1936) 58, 59

Williams v. Dale, 139 Or. 105, 108 (8 P. (2d) 578) 53, 54

Williams v. Terminal R. Ass'n., 98 S. W. (2d) 651; 339 Mo. 594; cert. denied, 300 U. S. 669 ..... 38, 45

Williston on Contracts, Vol. 6, R. Ed., Sec. 1849; 1855 ..... 53, 55

Williston on Contracts, Vol. 5, R. Ed., Sec. 1536 ..... 53, 57

Williston on Contracts, Vol. 3, R., Ed., Sec. 684, 686 ..... 47, 52

Williston on Contracts, R. Ed., Sec. 686 60

Williston on Contracts, R. Ed., Vol. 1, p. 294 ..... 63, 68

34 C. J. 833 60

1935 Oregon Code Supplement, Sec. 49-1814 47

1930 Oregon Code, Sec. 2-305 70

No. 9277

United States
Circuit Court of Appeals
For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JAMES RALPH HUNT, *Appellee.*

Brief of Appellant

Appeal from the District Court of the United States for the District of Oregon.

JURISDICTIONAL STATEMENT

It is believed this Court on appeal has jurisdiction for the reason the appeal is from a final judgment entered in the District Court (28 USCA, Sec. 225). The District Court acquired jurisdiction through removal from the State Court on defendant's petition for removal alleging facts showing diversity of citizenship between the parties which was uncontroverted (28 USCA 71). It is an ad-

mitted fact that at the time of the commencement of the within action, namely May 16, 1936 (T. 163) plaintiff was a resident and citizen of the State of Oregon and that defendant was a resident and citizen of the State of California (T. 2, 14) and the amount in controversy exceeded the sum of $3000.00.

STATEMENT OF CASE AND SUMMARY OF LAW

Plaintiff, a young man in his early twenties, was working as a filling station attendant at a filling station located at Fargo and Union Streets in the City of Portland, Oregon. His work consisted of the usual work around a filling station and occasionally changing and repairing automobile tires. On either June 11th or June 12th, 1934, while using a tire iron and prying on an automobile tire, plaintiff suffered a severe sprain in the lower part of his back.

> (T. 38) "Well, I put the large tire iron in and pried down on it, and as I pried on this tire iron the tire iron slipped and I fell forward, and at the time something snapped in my back just like it was an elastic band, I could hear it pop, and I fell down to the pavement and for two or three minutes, why I didn't have any use of my legs at all, they were paralyzed, and after I got the use of my legs I went into the station and I gave up all hopes of fixing this tire. * * *
>
> "I didn't do any hard work, just puttered around the station, put gas in the cars and check tires, and then went back after about the tenth day and got this new brace, and then he told me to wear this brace and return to work, with instructions that I was to do

light, easy work. I went back to work, and then I did this light work around there for a while. My back continued to bother me all the time. I couldn't lift anything heavy or strain myself, but as time went on, why the work increased at the station and I got in and I had to do my part of the work. I lubricated cars and I strained myself, and I repaired tires.

Q. Now, you say this back bothered you. Just what do you mean by that?

A. Well, it was a constant pain there. If I would strain myself the pain would go up from my back and it would ache, I would have to sit down and rest, and it made me irritable, and there was always a dull ache right between my hips."

The filling station was being operated by the Union Service Stations, Inc. (Originally named as a defendant in this action but dismissed from the case as Plaintiff's claim was limited to a subsequent injury sustained while working for defendant Union Oil Company and which plaintiff claimed aggravated this prior injury.) This filling station had been taken over on July 1, 1934, and the operation of it continued by the Union Oil Company. The Union Oil Company absorbed its subsidiary, the corporation known as the Union Service Stations, Inc., and assumed all its liabilities as of said date. Plaintiff continued to work at the same filling station after July 1, 1934, but as an employee of defendant Union Oil Company after said date.

Plaintiff, on June 12, complained that his back was hurting him as a result of the sprain and was sent by his employer to Dr. E. W. Simmons, who taped his back and saw him a time or two and then, as his back was not responding to the usual treatment, referred him to a bone specialist, Dr. R. B. Dillehunt, Portland, Oregon, who placed plaintiff first in a corset-like brace for his lower back and then had a special steel brace made which fit under the plaintiff's armpits and extended down to his hips and held his spine rigid. Plaintiff, from the time of the sprain in June, 1934, continued to wear this brace constantly except on occasions when in bed. He returned to his work at the filling station and was instructed to do light work only. (T. 39).

On November 5, 1934, while working for appellant, Union Oil Company, at said service station, plaintiff received a telephone call from an unidentified automobile owner who wanted a flat tire changed on his Plymouth automobile. It was shortly before three p. m., at which time plaintiff was scheduled to go off duty. Plaintiff was working alone at the filling station and when he was there alone he was in charge of the filling station (T. 50). Another employee who was to relieve plaintiff at three p. m. came a little early and plaintiff arranged with this employee to take his place at the station and plaintiff, driving his own Ford automobile, went to the place where the automobile tire was to be changed, which was about

a mile and a half from the station where plaintiff was working and only a few blocks from another Union Oil Station (T. 41). The tire to be changed was on the right rear wheel of a 1930 or '31 Plymouth Coupe automobile (T. 93). Plaintiff testified that the owner of the car who wanted the tire changed was drunk (T. 42). Plaintiff could get no help from him. Plaintiff used an ordinary Ford jack out of his own car. He crawled under the Plymouth, jacked it up and while crawling out, the car slipped off the jack and struck his back in the region of his sprain. Plaintiff testified it knocked him out temporarily, that he then got up and went down to the nearest Union Oil Service Station and got an attendant there to come back with him to the place of the accident. This attendant changed the tire on the Plymouth and then together with plaintiff drove back to the filling station where plaintiff worked. Plaintiff in considerable pain then drove his own car home, and after making telephone arrangements was driven several miles by his wife to Dr. Dillehunt's office. Dr. Dillehunt informed plaintiff that a fusion operation on his spine would be required to give him permanent relief. Plaintiff was confined to his bed to rest for a short period (no other treatment was given him). He lost no time from the payroll and did light work and continued to receive full pay until he entered the hospital on February 28, 1935, for the operation referred to.

Appellant Union Oil Company was under the State Compensation Act during June, 1934 and under the State Act no action could be maintained against it for plaintiff's original injury in June. It was not under the Oregon State Workmen's Compensation Act on November 5, 1934. It did, however, carry an insurance policy with a workmen's compensation endorsement with the Hartford Accident and Indemnity Company (T. 153 d. ex. 26), which workmen's compensation endorsement incorporates into it the Oregon State Workmen's Compensation Act and provides for the payment of compensation and other benefits by the insurance company to any injured workman willing to accept same, whether injured through the negligence of anyone or not, in lieu of the injured workman's right to bring action against his employer, all benefits and compensation payments in identical amounts as prescribed by the Oregon State Workmen's Compensation Act. An identical policy in form and coverage issued by this insurance company covered the predecessor company Union Service Stations, Inc., as operator of said service stations, and plaintiff as an employee thereof prior to and during June, 1934, which coverage expired on July 1, 1934, and was superceded by the policy referred to above. Plaintiff on February 28, 1935, with Mr. Russell, a supervisor of the Union Oil Company and his superior, went to the office of the claims adjuster of the Hartford Accident and

Indemnity Company, in the Lewis Building, in Portland, Oregon. The stipulated facts are: (T. 106, 107)

"The claims adjuster was already acquainted with plaintiff's prior accident of June 11, 1934, and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back, that he had gone to Dr. Dillehunt and Dr. Dillehunt had recommended a fusion operation of his spine. *Plaintiff inquired whether the insurance company would take care of the matter.* The claims adjuster for the insurance company said that the insurance company would pay for the operation and pay plaintiff's other medical and hospital expenses and pay the plaintiff compensation at the same rate as prescribed under the State Workmen's Compensation Act. Plaintiff then went to the hospital on February 28, 1935, and a fusion operation on his spine was performed by the said Dr. Dillehunt. Plaintiff was in the hospital from February 28, 1935, until April 20, 1935, and was convalescing from the time he was discharged from the hospital until June 24, 1935, at which time he was discharged by Dr. Dillehunt as completely cured and able to return to work and at that time plaintiff went back to work at a filling station of the defendant. He was given light work for the first few weeks and then reassumed his regular work. Plaintiff after the operation was able to discard his back brace and has never had to wear it since his operation. Plaintiff continued working as a service station attendant for the defendant and at the same station where he testified he was working when the accident occurred which brought on his back trouble. Plaintiff continued on at this same service station after he left the employ of the defendant, this service station having been leased by the plaintiff and another from the defendant and they continued operating it until about February 1, 1938, at which time plaintiff discontinued his employ-

ment at the service station and entered the employ of the American Tobacco Company, where he has been working ever since. His work for the American Tobacco Company is that of salesman. He drives a light delivery truck covering a territory out of Chico, California. At the time plaintiff went to the hospital for his operation until he returned to work several months later, he was dropped from the payroll of the Union Oil Company. During this period he received compensation payments from the Hartford Accident and Indemnity Company about every two weeks. The amount of his compensation payments was the same as prescribed under the Workmen's Compensations Act of the State of Oregon."

From February 28, 1935, until June 24, 1935, plaintiff received compensation payments from the Hartford Accident and Indemnity Company (T. exhibits). These payments ceased when plaintiff was discharged by Dr. Dillehunt as "recovered" and he resumed his work and went back on the payroll of his employer. The total paid to plaintiff and for his benefit is the sum of $813.15, as follows: Paid Dr. Dillehunt his bill for performing the operation in the sum of $414.50 (T. 153) and hospitalization for the plaintiff in the sum of $163.50; paid $235.30 to plaintiff, on drafts with notation indicating Ralph Hunt (plaintiff) was the "Injured or claimant," that the nature of the payment was compensation for a certain period, giving date of injury, and on each draft

it appears that the acceptance of the payment constitutes a clear release of his claim. An insurance policy is referred to on the drafts and payments were made under both policies.

The first two drafts referred to the accident as having happened on November 5, 1934. All the subsequent drafts referred to the accident as having happened on June 11, 1934. The claim agent for the insurance company explained that after payments had started, a change had been made in this respect as the doctor notified him that the injury to plaintiff's back was a recurrence of his injury of June 11th; that his company had had a policy in force for both periods and it didn't make any difference which one it was charged to.

(T. 136) "Q. Mr. Hadfield, I was asking you about the drafts, and I noticed one bears the number 543012, and one bears the number of 519380, giving policy numbers. How is it that there were two different policy numbers there on the drafts?

A. Well, that would come on the expiration of one policy and another one started. These policies run for a year at a time. * * *

(T. 137) Q. So there was a policy in force, then, both in June and in November, is that correct?

A. Yes, sir.

Q. And some of the drafts here were paid under one policy and some the other, is that correct?

A. That is right.

Q. So, so far as policy coverage was concerned, it didn't make any difference whether—(Interrup-

tion) the operation, if it was a recurrence of the first injury, we had nothing to do but to take care of it."

(T. 142) "Mr. Powers: Except that there was some reason why, when they first started paying under the second policy, the Union Oil Company policy, to show why they went back and started charging it up to the first policy again, the operation and the claim from November 5th.

(Further discussion)

Mr. Powers: Q. Can you state to the jury why that was, whether you had any conversation with the doctor about it?

A. Yes. Dr. Dillehunt informed us that it was a recurrence of July the 11th.

Q. Was that July or June?

A. Or June the 11th, pardon me.

Mr. Rauch: I didn't quite get your answer, Mr. Hadfield.

A. I said Dr. Dillehunt informed us this November 5th injury was a recurrence of the injury of June 11th.

Mr. Powers: Q. And that was the reason two different charges were made there against the different policies?

A. Yes."

It was alleged in appellant's answer that plaintiff's operation was necessitated by reason of a congenital anomaly, subject to stress and strain and was performed to strengthen his back and cure a chronic instability. (T.12)

Plaintiff admits that these sums were paid to him and paid for his benefit under the arrangement he had with the claims adjuster for the insurance company.

(T. 109) "Q. Then you got your wages right through from July 1st, 1934, or, for that matter, in June also of 1934, the time the first accident occurred, you got your wages right through up to the time you went into the hospital?

A. Yes, sir.

Q. Then, when you went into the hospital for the operation you got compensation payments?

A. That is right.

Q. And you got those compensation payments during the time that you were unable to go to work, during the time you were in the hospital and the time that you were off work?

A. Yes, sir.

Q. And that period ended about June 24th, 1935?

A. Right." * * *

(T. 111) "Q. Did you know that you were going to receive compensation payments when you were in the hospital?

A. Yes, sir.

Q. How did you know that?

A. Well, Mr. Russell told me that when I went to the hospital that I would go off of full salary.

Q. That you would go off of full salary?

A. Yes.

Q. And were you told that you would receive compensation payments and that the doctor bills would be paid for you?

A. Yes, sir.

Q. And you accepted those?
A. Did I accept the checks?

Q. You accepted the compensation payments and the payment of the doctor bills?

A. I accepted them, yes.

Q. You accepted those from the Hartford Accident and Indemnity Company; you knew there was a policy there, didn't you?

A. I surmised there must be or they wouldn't be paying it."

* * * *

(T. 112) "Q. Well was there a discussion there that that was the basis that the State Compensation fund pays?

A. I don't remember anything—if I remember right I think he said that fifty-three per cent would be a little more than what I would be paid ordinarily.

(T. 113) Q. Under the Compensation?

A. Under Compensation.

Q. Well, wasn't that because they gave you credit because of the extra money you had made because of the commissions? They took that into consideration to get your salary up a little bit for you to help out in going into that operation and get you a little more money per month?

A. That is right. I was entitled to that.

Q. And you had a choice then of going in and taking those compensation payments and having the bills paid for you or else suing the Union Oil Company, isn't that so? You could do one or the other?

A. Well, I imagine so. At the time I was interested in getting well.

Q. Yes, and you thought it was better to take these compensation payments and have your bills paid than to go into a lawsuit with them?

A. I didn't think anything about that.

Q. Well, that was the proposition, wasn't it, whether you would take the compensation payments and the—

A. There was nothing—well, they told me that they would pay my salary in the form of compensation, yes. * * *

(T. 117) Mr. Powers: "Q. You knew that was on the back of the checks, in other words?

A. Well, when I signed the checks it stated on the back that it was for the compensation for that lost time while I was in the hospital. * * *

(T. 129) Q. The compensation payments that you thought you were receiving there, Mr. Hunt, were they figured out down in Mr. Hadfield's office that day, the percentage you would get of your wages?

A. The compensation checks, they figured out it would be approximately fifty-three per cent.

Q. And that corresponded with the Industrial Accident Commission of the State?

A. I think so."

THE ISSUES of negligence as finally made up under plaintiff's complaint were whether the defendant Union Oil Company was negligent (a) in failing to furnish plaintiff with a safe automobile jack, and (b) whether

the defendant was negligent in failing to furnish plaintiff with an able-bodied assistant.

The action proceeded under common law, and plaintiff's remedy, if any, is governed by the common law. There was charged in the complaint that the action was under the Employer's Liability Act of Oregon. The District Court, however, ruled that the case did not fall within the provisions of the Employer's Liability Act and withdrew from the jury all questions of statutory liability and submitted the case to the jury solely under common law liability. (T. 166)

The answer denied any negligence and pleaded affirmatively (a) that the plaintiff had assumed the risk, if any there was, in using his own jack; (b) that plaintiff had been paid for the same injuries for which he was seeking to recover in the complaint and plaintiff had agreed to and did compromise his claim; and (c) contributory negligence.

The evidence respecting the jack was that plaintiff had used his own jack which he carried in his Ford automobile, that there was a jack at the station where he worked, that had a long handle on it and one that could be used without getting under a car, that he had not taken this jack with him, because he said it was too heavy for him to handle alone (T. 54) and that if an able-bodied man at the station had put it in his car for him he would have been unable to get it out of his car alone (T. 54).

Plaintiff testified he did not like to use the long-handled jack (T. 48, exhibit shown by photograph T. 150) because when he went to lower it he had to jiggle it to make it work. He stated that the station jack could be used without the necessity of getting under the car (T. 103). Plaintiff testified as to the occurrence of the accident:

(T. 44) "Q. The car fell off the jack?

A. Yes.

Q. What did it land on, the wheel, the flat tire?

A. It landed on the flat tire.

Q. Did you know it was going to fall?

A. No, I didn't know it was going to fall.

Q. It just fell.

A. It just fell.

Q. Well now, you say that jack of yours was safe enough?

A. Well, I thought it was safe enough. I had used it before.

Q. It didn't have anything to do with it there; as far as your jack was concerned, you felt it was all right to use?

A. Yes, sir. * * *

(T. 45) Q. Well now, what was wrong with that jack as far as operating on this particular car was concerned?

A. It was a short-handled jack. You had to climb back underneath the car and insert a small little handle into it and jack it up, and it had a flat top on the jack. It might have had a prong tip jack to clamp around that axle and hold it on.

Q. Couldn't you reach it from out in back?

A. No, sir.

Q. Well, why was it you couldn't reach it?

A. Well, understand my back is stiff all the time, and with that brace on there was no give. I had to be in straight position to work on the car.

Q. Well, as I understand you to say, the handle was too short?

(T. 46) A. Yes, this was a short handled jack.

Q. And you were complaining because it didn't have a longer handle there, one of those that fold up?

A. It could have had a folding up handle that extended out beyond the rear end."

There was no evidence that the shortness of the jack handle or the length of the jack handle had anything to do with causing the car to slip off the jack. The record is silent as to why the car slipped off the jack. There is nothing to indicate whether the jack was improperly placed under the axle or whether the brake was set or other factors which might cause a car to slip off of a jack. The evidence shows the length of the handle had nothing to do with the accident other than plaintiff accounts for his being under the car because of the shortness of his *own* jack handle. Plaintiff testified that the car on which he was changing the tire, had a longer rear overhang than

his own car. It is significant that another employee went ahead, changed the tire using the jack without trouble (T. 91).

Plaintiff undertook to change this tire of his own accord; no one in the company asked him to; moreover there was another Union Oil Service Station located close to where the tire was to be changed and the plaintiff could have had an employee from there go and change the tire.

> (T. 50) "Q. But if you had been there alone like you were you could have called that other station and had someone else go over there, couldn't you, and fix that tire?
>
> A. I could have, yes."

As to what an able-bodied assistant would have done had he gone, plaintiff testified:

> (T. 44) "Q. Now, you complained in your complaint about not furnishing you with an able bodied assistant. What would you have had the able bodied assistant do if you had had one along with you?
>
> (T. 45) A. Well, if I had had an assistant along with me he'd have got down there under the car and jacked it up.
>
> Q. He would have got hit in the back then instead of you?
>
> A. Well, he probably would have.
>
> Q. Well, only one man works under a car anyway, isn't that a fact?
>
> A. That is a fact.

Q. It wouldn't have taken both of you under there?

A. No, but the —

Q. What is that?

A. I didn't say anything."

* * *

Plaintiff never complained to defendant or any of its employees about the jack furnished by the defendant and never complained about using his own jack and never complained that the handle was too short on his own jack and never complained that it was improper or unsatisfactory to use.

Plaintiff filed no reply to defendant's answer respecting the compensation payments made to him and for his benefits. There was no affirmative pleading on the part of plaintiff that there was any fraud or misrepresentation concerning this matter or any allegation of a mistake. Plaintiff admitted that these sums were paid to him and for his benefit but claimed that he had never seen the policy of insurance until during the trial although in his first complaint filed in 1936, it was alleged affirmatively that the Union Oil Company had rejected the Workmen's Compensation Act, and a copy of one of the policies was marked as an exhibit and filed with clerk as such during pre-trial of case held several days before regular trial.

BRIEF SUMMARY OF LAW POINTS

(a) Did the plaintiff assume the risk of using his own jack?

(b) Is the jack a simple tool and if so, has an employer under common law the duty of furnishing safe and adequate simple tools?

(c) Can the plaintiff retain the fruits and benefits of his contract with the insurance company for the same injuries and still sue his employer in tort, especially in the absence of any allegation of fraud or misrepresentation or mistake?

(d) Does not recovery herein amount to double compensation for the same injury?

(e) Does this not constitute the splitting of a demand or cause of action?

(f) Has not plaintiff reached an accord with and had satisfaction from his employer's insurance carrier?

(g) Do not the endorsements on the drafts and dealings by the parties constitute a release; and does not the receipt of compensation payments by the plaintiff and the payment of benefits as prescribed by the Workmen's Compensation Act constitute an election, which in equity and good conscience would prevent the plaintiff from maintaining the present action?

(h) Was it not the duty of the Court to construe the

legal effect of the dealing of the parties under the written instruments, namely, insurance policies and drafts, which payments were made to the plaintiff?

(i) Assuming it was proper to submit these written documents to the jury as a mixed question of law and fact, was it not error for the Court to fail to instruct the jury to reduce pro tanto from any verdict the amount already received by plaintiff?

Throughout the brief where individual page numbers are referred to, the reference is to the reporter system, except with respect to Oregon cases where the page reference is to the Oregon report.

SPECIFICATION OF ERROR NO. I

Plaintiff as a matter of law assumed the risk and danger of being injured. Plaintiff's injury came about while he was using his own ordinary automobile jack and any risk and danger in so doing was incidental to his employment and was fully appreciated by the plaintiff (T. 185). (This point raised on motion for non-suit (T. 166) and for directed verdict (T. 27).)

AN EMPLOYEE AS A MATTER OF LAW ASSUMES ORDINARY RISK OF EMPLOYMENT.

Parker v. Norton, 143 Or. 165, 21 P. (2d) 790;

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1, 7 P. (2d) 796 (1932);

Christie v. Great Northern Railway Co., 142 Or. 321, 20 P. (2d) 377 (1933);

Bevin v. Oregon-Washington R. & Nav. Co., 136 Or. 18; 298 P. 204; (1931); certiorari denied, 284 U. S. 639;

Ferretti v. Southern Pacific Co., 154 Or. 97; 57 P (2d) 1280 (1936);

Wheelock v. Freiwald, 66 F. (2d) 694;

Northwestern Pacific R. Co. v. Feilder, 52 F. (2d) 400;

Walker v. Ginsburg, 244 Mich, 568; 222 N. W. 192;

Thompson v. Pennsylvania Railroad Company, 88 F. (2d) 148;

ARGUMENT

Specific reference is made to the fact that no complaint was made in this instance for the reason that it is quite commonly urged by an injured workman in order to get around the assumption of risk doctrine that he had complained of the tool or appliance furnished to his employer that it was unsafe for use and that his employer agreed to remedy the same. However, in this case there is no pretense of anything of that sort. Plaintiff's testimony was that he did not take the jack furnished by his employer because it was too heavy for him to manage.

Plaintiff made no request to his employer or anyone else for a jack but testified that he customarily used the jack out of his car, an ordinary Ford jack. The facts are uncontroverted—based on plaintiff's own testimony, he assumed the risk as a matter of law.

The district Court in denying appellant's motion for a new trial after stating that his only serious doubt on the motion was with respect to the defense of assumption of risk, said:

> "The Oregon Supreme Court in several decisions has relaxed the rigors of the common law doctrine of the assumption of risk. The Oregon Court has referred to the doctrine as 'harsh'." (T. 31, 32)

The District Court cited no cases for this statement and no cases were cited during argument to show that the Oregon Supreme Court had relaxed the common law doctrine of assumption of risk nor that it is a harsh doctrine but on the contrary, cases decided by the Supreme Court of Oregon repeatedly hold as a matter of law that an employee assumes ordinary risk of employment.

The assumption of risk doctrine was applied in the recent case of *Ferretti v. Southern Pacific Co.,* and nothing mentioned about the rule being harsh or the common law relaxed—nor have we observed such statement in any cases.

This rule of law respecting the assumption of risk doctrine as stated by the Supreme Court of Oregon is practically universal.

The rule and definition of the rule has been restated and cited so frequently that the same definition has been practically universally applied. In common law actions the assumption of risk doctrine is still good law under the decisions of the Oregon Supreme Court. The 8th Circuit Court of Appeals in *Wheelock v. Freiwald,* 66 F. (2d) 694, page 698, uses the same definition:

> "The risks assumed by an employee are those ordinarily incident to the discharge of his duty in the particular employment, and also those not ordinarily so incident, but of which he has actual or constructive knowledge, with full appreciation of the danger that may flow therefrom."

Citing a Supreme Court of the United States decision and numerous Federal Court decisions including one from this circuit, namely, that of *Northwestern Pacific R. Co. v. Feilder,* (C.C.A. 9) 52 F. (2d) 400. It is submitted that it would be hard to find a rule of law that has been applied and defined more universally by the Courts. There is nothing harsh about the doctrine; an employer is not an insurer.

The jack which plaintiff was using was an ordinary Ford jack that comes with a Ford car. It goes without

saying that there must be a million of them in use or that have been in use. They work on the very simple principle of leverage. By pushing the handle down, leverage occurs that will jack the car up in small stages at a time. Plaintiff's contention is that his employer failed to furnish a safe jack.

The Court should have held that plaintiff assumed the risk as a matter of law under the authority of *Freeman v. Wentworth & Irwin, Inc.*, 139 Or. 1, which is in point and is complete answer by the Supreme Court of Oregon contrary to plaintiff's contention. In that case a mechanic working as a specialist on truck transmissions, charged his employer with negligence in failing to furnish *safe tools*. The employee lost the sight of one eye through a particle of steel flying into it from a blow struck by him on a steel shaft with a ball peen hammer. Plaintiff claimed a copper hammer should have been furnished. The Court states, p. 9:

> "The plaintiff and some of his witnesses testified that a soft hammer made of copper, brass or babbit metal was not an ordinary hand tool but constituted a special tool. These witnesses testified that when hard steel is struck with a hammer made of soft metal no sparks are emitted. They added that employers of mechanics customarily keep such hammers or short strips of copper or brass in their tool rooms where the mechanics can obtain them upon request. The plaintiff swore that during his six years' employment by the defendant it had never furnished him with a hammer made of copper although, according to his testimony, he had asked it to do so. * * *
>
> "As we have said before, the duty to use due care

for its employees' safety did not require the defendant to supply the latest and most improved tools, but only such as were reasonably safe and of a kind generally used for that purpose. We know of no reason whatever why a short steel bar could not have been tapped into position by the use of a piece of oak; especially, do we know of no reason why this could not have been done by a workman who customarily used that method.

"But if we assume that the duty to provide the employees with reasonably safe tools could be satisfied with nothing but a copper hammer, and that such a tool was not an ordinary hand tool but was a special one, WE ARE SATISFIED THAT THE PLAINTIFF ASSUMED THE RISK WHICH RESULTED FROM ITS ABSENCE IN DEFENDANT'S SHOP. * * *"

"The plaintiff, by reason of his contract of employment is presumed to have agreed to assume all the risks ordinarily and obviously incident to the discharge of his duties. * * *

"It is apparent that the plaintiff had full knowledge of and appreciated the danger to himself which arose out of the defendant's alleged failure to keep in its tool room a copper hammer. Those two elements, as was said by Mr. Justice Burnett in Wintermute v. Oregon-Wash. R. & N. Co., supra, 'are the ingredients of assumption of risk.' Moreover, he neither asked for nor possessed an assurance that the defect would be remedied. We believe that it is obvious that the plaintiff assumed the risk resulting from the defendant's alleged default. In the carefully reasoned decisions announced in Golden v. Ellis, 104 Me. 177 (71 Atl. 649), and McDonald v. Standard Oil Co., 69 N. J. Law, 445 (55 Atl. 289), conclusions to like effect as our own were reached upon facts similar to those before us.

The above testimony and the foregoing principles of law induce the conclusion that the plaintiff failed to establish a cause of action against the defendant based upon common law negligence."

The assumption of risk doctrine was again applied by the Supreme Court of Oregon in reversing a judgment for plaintiff in the case of *Parker v. Norton,* 143 Or. 165 (21 P. (2d) 790) and the Court states, p. 173:

> "The work in which plaintiff was engaged was simple in character and any dangers involved were open and obvious. It is not the duty of the master to point out dangers readily ascertainable by the servant himself if he makes ordinarily careful use of such knowledge, experience and judgment as he possesses: Labatt's Master & Servant, Sec. 1144. As stated in 18 R. C. L. 569: * * *
>
> "In Wike v. O. W. R. & N. Co., 83 Or. 678 (163 P. 825), a carpenter was injured while placing asbestos lagging on the boiler of an engine. In commenting on an instruction relative to the duty of the defendant to warn the plaintiff, the court said:
>
> " 'Furthermore, the work was simple, well within the comprehension of any man who had had a half day's experience at it, as one of the witnesses testified. The only danger incident to the work which counsel for plaintiff has called to our attention is the tendency of wire to spring unless it is attached or straightened. Plaintiff must have understood this tendency as well as anyone. The master is under no obligation to warn the servant under such circumstances; * * *' Citing numerous authorities in support of the text.
>
> "Also see Magone v. Portland Mfg. Co., 51 Or. 21 (93 P. 450)." * * *

Also citing from the Case of *Walker v. Ginsburg,* 244 Mich. 568 (222 N. W. 192); the following language:

"That plaintiff might fall, and that the bar might slip, were dangers so obvious that defendants had no duty to warn of them."

The situation is analagous to one considered by the 6th Circuit Court of Appeals in the case of ***Thompson v. Pennsylvania Railroad Company,*** 88 F. (2d) 148, in which case the plaintiff brought an action for damages against his employer based upon

"negligence of his employer in failing to furnish him with *proper tools* for the performance of the work upon which he was engaged, * * *"

It appears that on the day of the accident, the employee was

"engaged in turning a main engine driving rod by means of a steel bar inserted into one of the bearings of the rod. His explanation of the accident is that the bar slipped from the bearing and caused him to be thrown violently to the floor."

In addition to the steel bar pin which the injured workman was using

"there was also available a chain hoist, the use of which was optional, although the plaintiff testified that at the time of the accident the chain hoist was not in position where it could be safely employed to turn the rod upon which he was engaged."

It was the contention of the injured workman that a wooden pole with a different length handle should have been used, that he had asked the foreman where the wooden pole handles were and was told that they used a steel pin bar and that he was to use it. He again asked the foreman whether he was going to get a wooden bar and was told "No, we break too many" and that "other men use a steel pin bar and you go ahead and use it." And later, when he asked for a wooden pole, he was told "forget it." The Court sets forth the following facts, P. 150:

> "On the morning of the accident, finding it difficult to turn the rod, he asked a fellow workman to aid him, and, while they were both pulling on the pin bar inserted in the bearing, the foreman came to him and said: 'This is a one man job. If you can't do the work alone go to the office and get your time.' He then continued the work alone.
>
> "The defense to the action below was a general denial and the affirmative defense of assumption of risk in the use of a simple tool, and election by the appellant to use pin bar rather than the chain hoist. Ruling upon the motion for directed verdict at the conclusion of all the evidence, the District Judge, finding no question to exist as to realization of real or fancied danger by the appellant in the use of the steel bar, and in reliance upon our decision in Hallstein v. Pennsylvania R. Co., 30 F (2d) 594, granted the motion on the ground that the appellant had assumed the risk incurred in the use of the tool.
>
> Before reaching any question of assumption of risk, however, the primary question is whether there has been actionable negligence on the part of the defendant, and this, of course, involves not only failure to exercise due care but the causative relation of such

failure to the injury. The burden of proof being upon the plaintiff to establish actionable negligence, the issue as to both its elements is clearly raised by a motion for peremptory instructions based upon the failure of the evidence to sustain a verdict. While all important facts were sharply in issue, we view the plaintiff's evidence, as under familiar rules we must, in the light most favorable to him. * * *"

The Court held in the first place that there was no actionable negligence shown, and then stated:

"Another consideration supports our conclusion. The pin bar is a lever, *and a lever is not only a simple tool,* but indeed the simplest of all tools. Its function and manner of use is intuitively grasped even by those least accustomed to tools. It is, we think, incredible that the pin bar, inserted into the bearing hole as described, with force exerted thereon as indicated, could have slipped. It is the law of the lever, to be found in any elementary text-book on physics, that the moment of the effort is equal to the moment of the resistance. Theoretically therefore, the force operating to retain the bar in position equals the force exerted at the point of its application. A proper positioning of the lever would have effectively locked it against movement, and neither the bar, the resistance, nor the fulcrum failed. The irresistible inference therefor is that the bar was not properly inserted in the first instance or was permitted to get out of place between the appellant's first and second effort to turn the rod. Failing in credibility since necessary physical facts refute it, the evidence in this respect does not rise to the dignity of substantial evidence. Southern Railway Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239; Ristucci v. Norfold & W. Ry. Co., 60 F. (2d) 28. 29 (C.C.A. 6)."

Comparing the facts in the instant case to those above, there is seen to be a close similarity. The charge of negligence is similar and the reasoning of the Court is equally applicable to our situation. Plaintiff in our case testified the car slipped off the jack. There is no light thrown on what caused the car to slip off the jack. The car may not have had the brakes set before the jacking operation was commenced, which could have caused the car to slip and certainly the car could have been prevented from slipping by the very simple and usual precaution of chocking the wheels. It is obvious that if the wheels had been properly blocked the car could not have slipped off the jack. It is equally obvious that the length of the jack handle had nothing to do with the car slipping off the jack

AN EMPLOYEE CREATING HIS OWN WORKING CONDITIONS ASSUMES THE RISK THEREOF.

Phillips v. Keltner, 124 S. W. (2d) 71; 276 Ky. 454;

City Timson v. Powers, 119 S. W. (2d) 145; Tex.;

Dinuhn v. Western N. Y. Water Co., 297 N.Y.S. 376; 252 App. Div. 51;

ARGUMENT

The law is that where working conditions become unsafe during the progress of work away from the employer's premises, there is no liability on part of the employer for failure to furnish a safe place to work.

An employee who chooses his own working conditions or makes his own place to work cannot complain that his employer was negligent in failing to furnish him a safe place in which to work. The plaintiff here entirely unknown to his employer, undertook the manner in which he was going to change the tire on this car. It may be that the car should have been moved to some other place to make it safe to work on. It may be that the wheels of the car should have been blocked to prevent it from rolling and slipping off the jack. These were matters that were up to the plaintiff himself to determine. It would be just as logical to allow the plaintiff to recover here as it would to allow him to recover if he stepped out from behind the car and was struck by another passing automobile, making the claim that his employer failed to furnish him with a safe place to work.

AN EMPLOYEE USING HIS OWN TOOLS, ASSUMES THE RISK THEREOF.

Hartz v. Shaefer, 154 Atl. 713; 303 Pa. 449 (1931);

Harkins v. Standard Sugar Refinery, 122 Mass. 400; (decided prior to N. E.);

Fellows v. Stevens, 170 Mich. 13; 132 N. W. 1047; 135 N. W. 823; 39 C. J. 621.

ARGUMENT

Another proposition of law under the facts in this case which absolutely defeats plaintiff's contention that de-

fendant here was negligent with respect to failing to furnish a safe and suitable jack is the fact that the plaintiff was using HIS OWN APPLIANCE. It is held that when an employee uses his own appliance or tools, he cannot claim any breach of duty on the part of his employer for failing to furnish safe ones or suitable ones.

In the case of *Hartz v. Shaefer,* supra, a guy rope while being used to hoist steel in place, broke. The Court says, p. 713:

> "The record shows that for the purposes of this particular work, the apparatus *belonged* to plaintiff's husband and others"

and holds as a matter of law, p. 713:

> "Where a servant furnishes the tools with which he works and they are or become defective or unsafe, occasioning an injury to the servant, the master cannot be held liable. Harkins v. Standard Sugar Refinery, 122 Mass. 400; Fellows v. Stevens, 170 Mich. 13, 132 N. W. 1047, 135 N. W. 823; 39 C. J. 621."

This is the same holding as made by the Supreme Court of Oregon in the *Freeman against Wentworth & Irwin, Inc.* case, supra. The same situation was present there. An employee using his own tool was claiming that his employer was negligent in failing to furnish him with

a safe one. The Court held that under common law doctrine even though the employee had complained to his employer about the tool and had been promised that another one would be obtained, nevertheless he would be charged with having assumed the risk, as a matter of law.

AN EMPLOYEE WHO HAS COMPARATIVE OR EQUAL KNOWLEDGE WITH HIS EMPLOYER IS HELD TO THE ASSUMPTION OF RISK DOCTRINE.

Hagermann v. Chapman Timber Co., 65 Or. 588; 133 P. 342;

Weeklund v. Southern Oregon Co., 20 Or. 591; 27 P. 260;

McEachin v. Yarborough, 74 S. W. (2d) 228; 189 Ark. 434 (1934);

Owen v. Elliot Hospital, 136 Atl. 133; 82 N. H. 497 (1927).

ARGUMENT

Another proposition of law which prevents the plaintiff from recovering herein is that of comparative knowledge.

It is held that where a servant's knowledge of defects in appliances and of the dangers incident thereto, is equal

to that of the master, that he assumes the risk and cannot recover.

This rule of comparative knowledge is the law in the State of Oregon. In the case of *John Weeklund v. The Southern Oregon Company* this doctrine was upheld by the Court reversing a judgment which plaintiff had obtained in the lower Court. The Court held (headnote 2):

> "Knowledge of Servant.—Where the plaintiff assisted in the construction of the chute for moving large timbers, and had as complete knowledge of its sufficiency for the purpose for which it was constructed as the defendant, and received an injury in the moving of the timbers down said chute, defendant is not responsible on account of its alleged unsuitableness for the purpose for which it was used."

This rule was again followed by the Supreme Court of Oregon in the case of *Hagermann v. Chapman Timber Company* where again the Court reversed a judgment obtained by the plaintiff on the grounds that the employee was as well aware of the danger as was his employer (Point 6) and this is still good law in the State of Oregon.

In *McEachin v. Yarborough,* supra, the Court states, p. 229:

> "It is a fundamental rule in the law of negligence that liability exists when the perils of the employment are known to the employer but not to the

employee, and NO LIABILITY IS INCURRED WHEN THE EMPLOYEE'S KNOWLEDGE EQUALS OR SURPASSES THAT OF THE EMPLOYER. 18 R. C. L., p. 548; Arkansas Smokeless Coal Co. v. Pippins, 92 Ark. 138, 122 S. W. 113, 19 Ann. Cas. 861. The uncontradicted testimony here shows that the employer had no superior knowledge to that of employee in reference to the nature of the stone being used, therefore had no duty to perform the neglect of which would create liability." *Owen v. Elliott Hospital,* 136 Atl. 133, p. 134:

"The cases have uniformly enforced the assumption of risk rule when the servant's knowledge of the danger is equal to, or greater than, the master's. Ahern v. Amoskeag Mfg. Co., 75 N. H. 99, 102, 71 A. 213. 21 L. R. A. (N.S.) 89, and cases cited: Fontaine v. Johnson Lumber Co., 76 N. H. 163, 80 A. 338; Zajac v. Amoskeag Mfg. Co., 81 N. H. 257, 262, 124 A. 792; Hood v. Consolidation Coal Co., 82 N. H. 75, 129 A. 490. 'It cannot reasonably be found that of two persons of equal knowledge and of equal ability to appreciate and understand a danger, one is in fault for not apprehending the danger and the other is not.' Ahern v. Amoskeag Mfg. Co., supra, page 102 (71 A. 215)."

This doctrine of comparative knowledge or equal knowledge would appear to be applicable in the instant case. Plaintiff himself knew about his own jack and certainly he knew as much about it as the defendant. There is no evidence that the defendant knew anything about the plaintiff's jack. Moreover the plaintiff knew what

the conditions were under which he was working. He knew the condition his back was in and what he could do and could not do with respect to crawling in and around and under cars. He had been working for defendant doing this type of work for more than a year prior to the time the accident occurred. He testified that he used his own jack in going off the lot and changing tires and that he would go off the lot to change tires on other cars averaging upward of four times a week. (T. 41, T. 99). Plaintiff knew as well as defendant would know that in using his jack that if the jack was set in an uneven place or if there was some other apparent reason why the automobile might move and slip off the jack that this could all be prevented by blocking the wheels of the car or the brakes could be set on the car to keep it from moving so that it couldn't slip off the jack. The plaintiff was working at this task alone. The defendant wasn't present, did not know what the conditions were. Plaintiff made his own conditions under which he was going to work. The plaintiff had knowledge of these conditions; the defendant did not, and under the circumstances it is submitted that the plaintiff assumed the risk as a matter of law.

IF PLAINTIFF UNDERTOOK WORK BEYOND HIS PHYSICAL CAPACITIES HE IS NOT ENTITLED TO RECOVER.

ARGUMENT

A man himself knows best what he is capable of doing. His employer is not liable if a workman undertakes work beyond his physical capacity.

Ferretti v. Southern Pacific Co., 154 Or. 97. An action in which plaintiff, an injured employee, sought damages against his employer. Plaintiff had sustained a broken arm in a prior injury and claimed his employer was negligent in requiring him, before his injured arm had regained its strength, to do work beyond his physical capacity. The Court states, P. 101, 102, 105:

> "Plaintiff claims that as a result of being ordered and directed to do this work above mentioned, in his physical condition, his right arm was 'badly twisted, displaced and forced back', and that he is permanently injured. There is some evidence tending to show permanent injury. * * *
>
> "No contention is made by counsel for plaintiff that recovery could be had under the common-law rules of negligence. It is clear that plaintiff fully understood and appreciated the risks incident to his employment. He, as well if not better than his employer, knew whether the work in which he was engaged was beyond his physical capacity. See Ehrenberger v. Chicago R. I. & P. Ry. Co., 182 Iowa 1339 (166 N. W. 735, 10 A. L. R. 1388); Worlds v. Georgia R. Co., 99 Ga. 283 (25 S. E. 646); Leitner v. Grieb, 104 Mo. App. 173 (77S.W.764), and Williams v. Kentucky River Power Co., 179 Ky. 577 (200 S. W. 946, 10 A. L. R. 1396), wherein recovery was denied in personal injury actions based upon the alleged negligence of the employer in ordering and directing an employee to do work beyond his known physical capacity. * * *

"Since the act, in our opinion, has no application and THERE PLAINLY COULD BE NO RECOVERY UNDER THE COMMON LAW RULES OF NEGLIGENCE, the defendants were entitled to a directed verdict."

SPECIFICATION OF ERROR NO. II

AN EMPLOYEE AS A MATTER OF LAW ASSUMES THE RISK OF USING SIMPLE OR ORDINARY TOOLS. Plaintiff having been injured while using an ordinary simple tool, the Court should have ruled that he assumes the risk as a matter of law and the Court further erred in instructing the Jury that defendant had duty of furnishing the plaintiff with safe and adequate tools for tire changing. (This point raised on motion for non-suit (T. 166) and for directed verdict (T. 27).

Spain v. Powell, 90 F. (2d) 580;

Middleton v. National Box Co., 38 F. (2d) 89;

Middleton v. Faulkner, 178 So. 583; 180 Miss. 737;

Williams v. Terminal R. Ass'n., 98 S. W. (2d) 651; 339 Mo. 594; Cert. denied 300 U. S. 669.

ARGUMENT

The rule is well established that an employer has no duty or liability to an employee for failure to furnish safe, ordinary appliances or tools. This under the so-

called simple tool doctrine and the theory is that an employee is in as good a position to know whether the tool is safe as is his employer. The reason for the so-called safety tool rule, as pointed out by the Court, is the use of modern, dangerous and complicated machinery and equipment. It is submitted that the Court erred in failing to rule as a matter of law that plaintiff had assumed the risk of using simple tools and further intensified the error by instructing the Jury the defendant had the absolute duty of furnishing the plaintiff with safe tools. The Court instructed the Jury (T. 169, 170):

> "Now, every employer has the duty of providing reasonably safe and adequate tools for his employees to work with, and that is the charge the plaintiff has made against the defendant in this case, that reasonably safe and adequate tools were not provided for this tire changing. Now, that is for you to decide, whether the defendant's conduct did not come up to that standard of its obligation as an employer. If you are satisfied by a preponderance of the evidence that the defendant did not provide reasonably safe and adequate tools for this work and that the plaintiff was injured as he claims, and that the failure to provide these tools was the proximate cause of his injury, which means the direct cause, then the plaintiff has established his claim as against the defendant."

If an automobile jack which comes as standard equipment with every Ford car is an ordinary or simple appli-

ance, then obviously the Court should have held as a matter law that plaintiff assumed the risk and the above instruction was erroneous and tended to intensify the error.

The case got cluttered up with testimony as to the latest and most modern type of equipment. Such testimony would be inadmissible in an action to recover at common law. This testimony, however, was allowed to come in prior to the Court's ruling that the Employer's Liability Act did not apply and that the case would proceed as a common law action. Plaintiff testified there was a later type jack (a screw type) that should have been furnished (T. 55). Our Supreme Court of Oregon has held that an employer has no duty under the common law to furnish an employee with the latest and most modern equipment.

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1, 11:

> "As we have said before, the duty to use due care for its employee's safety did not require the defendant to supply the latest and most improved tools, * * *"

All the testimony concerning the latest and most modern equipment and plaintiff's testimony that a screw type jack was later and more modern and should have been furnished was misleading and confusing to the Jury especially in view of the Court's foregoing instruction.

This instruction imposed upon the defendant obligations way beyond the duties imposed by common law and prevented the defendant from having a fair trial.

The Courts have repeatedly held that ordinary appliances and tools that are in general use fall within the simple tool doctrine. Where there is nothing complicated about the appliances or tools, an employee is at common law charged with assuming the risk of using them. There is no duty on the part of the employer to see that such tools are safe. We cite a few cases which illustrate the rule and they are cases involving larger and more complicated tools than the Ford jack that was being used in the instant case. The cases, however, were selected because of their analogy in the principle of leverage.

Spain v. Powell, 90 F. (2d) 580 (4 C.C.A. 1937), an action for personal injuries in which plaintiff was engaged in making repairs to a refrigerator car. One of the wheels of the car had developed a flat surface and it became necessary to remove a pair of wheels of which it was a member from the truck beneath the body of the car. In order to remove the wheels it was necessary to take out the springs by hand and to accomplish that the bolster had to be raised to relieve the springs of its weight. The Court, p. 581, says:

> "For this purpose a chain is placed around the bolster at each end, a lever six feet long is inserted between the chain and the bolster, and the side of the

truck is used as a fulcrum. A helper sits on the free end of the lever, thereby lifting the bolster from the springs and enabling the car repairer to remove them. After the wheels have been removed and replaced, the bolster is again lifted to permit the replacement of the springs. While the plaintiff in the pending case was engaged at this point of the operation in replacing the springs on one end of the truck, the chain gave way and the bolster fell upon his right hand and caused the injury.

"The gist of the action is that the plaintiff was not furnished with a suitable chain for the work. * * *

"Even if we assume, in the absence of a showing to the contrary, that it was the mechanical device and not the human agencies which failed, the plaintiff is no better off. He was qualified by long experience to understand the true nature of his work and he was dealing with a very simple tool or device. The rule in the case of simple tools was stated by this court in Newbern v. Great Atlantic & Pacific Tea Co., 68 F. (2d) 523, 525, 91 A.L.R. 781, as follows:

"It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employee, to see that machinery and appliances which may cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects. 39 C. J. 342, 419; 18 R.C.L. 563; Kilday v. Jahncke Dry Dock & Ship Repair Co. (C.C. A. 3) 171 F. 394; Middleton v. National Box Co. (D. C.) 38 F. (2d) 89; Taylor v. A.C.L.R. Co., 203 N. C. 218, 165 S. E. 357; Cole v. S. A. L. Ry. Co., 199 N. C. 389, 154 S. E. 682; Martin v. Highland Park Mfg. Co., 128 N.C. 264, 38 S. E. 876, 83 Am. St. Rep. 671; and see notes in 1 L.R.A. (N.S.) 949; 13 L.R.A. (N.S.) 668; 30 L.R.A. (N.S.) 800; 40 L.R.

A. (N.S.) 832; 51 L.R.A. (N.S.) 337; L.R.A. 1918 D, 1141. This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumes the risk, but the servant assumes the risk because the master is relieved of responsibility, or what is probably a more accurate statement, the same circumstances which establish assumption of risk on the part of the servant show that there is no duty on the part of the master. Assumption of risk by the servant does not necessarily imply negligence on the part of the master."

The same rule is announced in *Middleton v. National Box Co.,* 38 F. (2d) 89, (D.C., S.D. Miss. 1930) p. 90, the Court:

"They hold that in the case of simple tools the master, as a matter of law, is relieved of the ordinary duty of furnishing safe tools and appliances to the servant, and of inspecting and repairing the same when furnished.

"In Wausau Southern Lumber Company v. Cooley, 130 Miss. 333-341, 94 So. 228, 229, the court says: 'A careful examination of the law upon the subject convinces us that the master is not under any duty to the servant as to furnishing a safe tool in the case of such a simple tool as the one in the case at bar, (an axe) and, being under no duty, there can be no breach of duty and hence no liability resulting therefrom.'

"Bear Creek Mill Co. v. Fountain, 130 Miss. 436, 94 So. 230 231, was to the same effect, the court saying: 'We think on the simple tool proposition this case comes within the authorities reviewed and announced in the opinion this day handed down in the case of Wausau Southern Lumber Co. v. Cooley, 130 Miss. 333, 94 So. 228.'

"In the latter case of Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117, 118, the court reaffirmed the holding in Wausau Southern Lumber Company v. Cooley, supra, and quoted with approval from that case as follows: 'In order to predicate liability in the suit against the master for personal injury, there must be some negligence upon the part of the master which causes the injury. The master is not under duty, as regards a mere simple tool, to furnish a servant with a safe tool; the servant's knowledge and judgment in such case being equal to that of the master.'"

And again the Supreme Court of Mississippi in the case of *Middleton v. Faulkner,* at page 584, states:

"But as these modern rules of obligation on the part of the master arose and became definitely estab-

lished, they were made to apply only to the situations or conditions which furnished the reasons therefor, and therefore were not extended back to the simpler tools of earlier days and those similar thereto. Thus the common law of today, as declared in numerous decisions of this court, is that ordinarily the master is under no obligation of care in regard to the safety of simple tools, either in the furnishing thereof or in their maintenance and repair."
Citing numerous authorities.

And again in the case of *Williams v. Terminal R. Ass'n* at page 654:

"Pryor v. Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120, reversing Williams v. Pryor, 272 Mo. 613, 200 S. W. 53. Many other cases have made a similar application to that made in the Kuhn and Williams Cases of the rule of assumption of risk in cases of eye injuries caused by flying objects, sustained by section men WORKING WITH SIMPLE TOOLS AT USUAL TASKS OF TRACK REPAIR WORK. Harper v. Chicago, R. I. & P. R. Co., 138 Kan. 782, 28 P. (2d) 972; Jones v. Southern Ry., 175 Ky. 455, 194 S. W. 558; York v. Rockcastle River R. Co., 215 Ky. 11, 284 S. W. 79; Louisville & N. R. Co. v. Russell, 164 Miss. 529, 144 So. 478; Texas & P. R. Co. v. Perkins (Tex. Com-App.) 48 S. W. (2d) 249; Guitron v. Oregon Short Line R. Co., 62 Utah, 76, 217 P. 971; McGraw v. New York Cent. R. Co., 111 W. Va. 175, 161 S. E. 9; Karras v. Chicago & N. W. R. Co., 165 Wis. 578. 162 N. W. 923, L. R. A. 1917 E, 677."

It is submitted that the District Court's instruction in the instant case was erroneous and did not state the law and even assuming it was a question of fact to be determined by the Jury whether this was or was not a simple tool, the instruction was wrong. The instruction took this very fundamental proposition away from the Jury as a matter of law and had the effect of stating that the jack was not a simple tool or appliance but as a matter of law was a dangerous appliance. Such an instruction virtually imposed upon the defendant a liability of insuring the plaintiff's safety. The instructions were applicable only to dangerous machinery and equipment.

SPECIFICATION OF ERROR NO. III

Plaintiff made demand and elected to take compensation payments. He has been compensated once for the same injury and released his claim. (This point raised on motion for directed verdict (T.27) also Court instructions (T. 176).)

> (Mr. Powers) "And I think we should have an instruction in this case along the lines requested in defendant's requested instructions that a man is only entitled to be compensated for his injuries only once; he isn't entitled to a double compensation for the same injuries." * * *

PLAINTIFF MADE AN ELECTION TO AND DID ACCEPT THE COMPENSATION BENEFITS AS PROVIDED IN THE INSURANCE POLICY WHICH WAS THE EXERCISE OF A REMEDY INCONSISTENT WITH PRESENT ACTION.

1935 *Oregon Code Supplement,* Sec. 49-1814;

King v. Union Oil Co., 144 Or. 655, 24 Pac. (2) 345;

Anderson v. Hartford Accident and Indemnity Co., 152 Or. 505; 53 P. (2) 710; 54 P. (2) 1212;

Roles Shingle Co. v. Bergerson, 142 Or. 131 (19 P. (2d) 94);

Holmes v. Henry Jenning & Sons, 7 F. (2d) 231;

Robb v. Vos, 155 U. S. 13;

Williston on Contracts, Vol. 3, R. Ed., Sec. 684, 686.

ARGUMENT

Plaintiff accepted the benefits under the insurance contract and it is too late for him to now say that he didn't understand that he was waiving his action for damages against his employer. There is nothing harsh or inequitable about the terms of the insurance policy. It provides the insurance company will voluntarily pay to any injured workman willing to accept the same, all pay-

ments and benefits as prescribed by the State Workmen's Compensation Act. In other words, the plaintiff is in the same position as any other injured workman who happens to be under the act except such other injured workman would not have right of election. He would have to take the benefits of the act, whereas the plaintiff, after he was injured, had two alternative remedies. He could bring an action in tort against his employer or accept the benefits under this insurance contract. Plaintiff did not have the right to do both. He could only do one or the other.

The Oregon Workmen's Compensation Act appears in the 1935 Oregon Code Supplement. Section 49-1814, a part thereof, provides that compensation paid under the act to an injured employee and received by him "shall be in lieu of all claims against his employer on account of such injury." This provision of the law is incorporated in the compensation endorsement on the insurance policy (T. 157):

> "It is agreed that all of the provisions of such Workmen's Compensation Law shall be and remain a part of this contract as fully and completely as if written herein as a measure of the compensation or other benefits for any personal injury or death covered by this policy * * *
>
> "This is a contract between the Company and this employer for the benefit of any employee covered by this policy who receives an injury for which he would been entitled to compensation under the provisions of such law if this employer was subject thereto. It is

the purpose hereof to provide voluntarily such compensation to such injured employees as will accept it in lieu of all other claims or demands because of such injury. * * *"

It was held by the Supreme Court of Oregon in ***Roles Shingle Co. v. Bergerson,*** that a (Headnote 2)

"Workman may by contract substitute remedy of compensation Act for common-law remedy for injuries received in course of his employment."

And it has been repeatedly held in this jurisdiction that accepting compensation payments extinguishes the common-law right on the theory of election between two inconsistent remedies.

The Supreme Court of Oregon in the case of ***King v. Union Oil Company,*** held that a minor who had received compensation under the State Act (although uninformed as to the legal effect in doing so) constituted an election which would bar a common law action against a third party. The Court cites the Federal cases referred to above as in harmony with this doctrine, stating p. 666:

"Our attention has not been called to any statute making it unlawful for the county to employ this boy at the season of the year when the accident occurred in the work he was then doing. While he was only ten years of age, the statute made him sui juris for the

purposes of the act and presumably, in making his claim for compensation and in accepting payment thereof, his father was acting as his natural guardian. It is a well settled rule that when a party has two remedies inconsistent with each other, any act, done by him with a knowledge of his rights and of the facts, determines his election of the remedy. Robb v. Vos, 155 U. S. 13.

"This court has decided numerous cases where small payments had been made under the act by the commission which had afterward been repaid and it was held that the right to elect had not been lost. In none of these cases, however, were the facts proven as conclusive upon that question as in the instant case. Hicks v. Peninsula Lumber Co., supra, is one of such cases. In this connection it must be remembered that, when an election has once been made to take under the act, the cause of action automatically inures to the state and no longer abides with the injured workman and thereafter the state alone can sue and that for the benefit of the accident fund. See Holmes v. Henry Jenning & Sons, supra. Hence, we hold that, if plaintiff ever had the right to make the election, such right did not exist after he *had received full compensation* under the statute.

"For these reasons, the judgment must be reversed * * *"

As was said by Judge Wolverton in *Holmes v. Henry Jenning & Sons,* 7 Fed. (2d) 231, after holding that where an injured man had accepted part compensation and then commenced an action against a third party that this constituted an election, p. 234:

"I come the more readily to this conclusion, knowing that plaintiff will recover his compensation from the commission under the act.

"It is urged that plaintiff's state of mind was such that he did not fully realize what he was doing when he made the application for compensation. The contention, however, is not sustained by the evidence, and no mention is made of it in the pleadings, and no issue is presented involving such a controversy. *I have but to say, further, that I regard the Workmen's Compensation Act a wholesome and humane piece of legislation, and its letter and spirit should be maintained in all applicable cases.*"

So in this case, the plaintiff has not been left out in the cold and the plaintiff has not received anything but fair treatment. If the plaintiff has any permanent partial disability, he would have a right under the insurance policy to make a claim and have the matter determined by medical arbitration and if such disability exist to be compensated for it under the terms of the policy.

As stated by Williston, election does not depend on intention so here, even though the plaintiff may not have intended to surrender his right of action against his employer, he could not, after exercising an alternative remedy by accepting benefits under the insurance contract, then turn around and sue his employer, no matter what his intention was.

Williston on Contracts, Vol. 3, R. Ed., Section 684, p. 1971:

> "Election does not depend on intention.—In a correct definition of waiver, wherever that word is used in the sense of election, the requisite of even apparent intention to surrender a right is absent. The law simply does not permit a party in the case supposed to exercise two alternative or inconsistent rights or remedies."

And again *Williston on Contracts,* Vol. 3, Sec. 686.

> "What manifestation of election is final.—The question when election of one of two inconsistent courses has gone so far as to preclude subsequent choice of the second course when the first proves ineffectual is raised in several classes of cases. If the change from the first alternative to the second involves any substantial injury to the other party, clearly the change ought not to be permitted, * * *"

There was an offer and acceptance here between the insurance company and plaintiff. Plaintiff accepting compensation payments and other benefits over a long period of time manifests clearly his intention to take under the contract and he will not now be allowed to say that he had a mistaken idea about the matter and that because

of a silient mental reservation he did not intend to relinquish his right of action against his employer. Such assertions of silient mental reservations have many times been put forward but they are not allowed by the courts to relieve a party from his contract. The case of *Anderson v. Hartford A. & I. Co.* upholds the provision of an identical insurance contract under which benefits were paid to an injured employee.

COMPENSATION PAYMENTS AS MEASURED AND PRESCRIBED BY THE STATE ACT CONSTITUTE SATISFACTION AND TO ALLOW FURTHER RECOVERY FOR SAME INJURY VIOLATES RULE AGAINST DOUBLE COMPENSATION.

Williams v. Dale, 139 Or. 105, 108 (8 P. (2d) 578);

McDonough v. National Hosp. Ass'n., 134 Or. 451 (294 P. 351);

Matheny v. Edwards Ice M. & S. Co., 39 F. (2d) 70;

Holmes v. Henry Jenning & Sons, 7 F. (2d) 231;

Williston on Contracts, Vol. 6 R. Ed., Sec. 1849; 1855;

Williston on Contracts, Vol. 5 R. Ed., Sec. 1536;

O'Donnell v. Clinton, 145 Mass. 461, (14 N. E. 747);

ARGUMENT

The benefits provided for by the Workmen's Compensation Law of Oregon constitute satisfaction, *Williams v. Dale,* p. 108:

> "It is one of the main objects of the Workmen's Compensation Law that suitable, speedy relief may be rendered to an employee who, together with his employer, comes within its provisions, and although the compensation may not, in all cases, be as great as would be recovered in cases of negligence, nevertheless the amounts provided for, when awarded, *take the place of and are in full settlement for such injuries.*"

Again the Supreme Court of Oregon in considering an action by an employee who had already received compensation under the State Act, held that an injured person is entitled to only one satisfaction and that the amount the injured person received, or was entitled to receive as prescribed by said act, constituted satisfaction. *McDonough v. National Hospital Association,* p. 455:

> "The general rule is that when a plaintiff has accepted satisfaction in full for an injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages."

Both of the Federal cases cited stand for the proposition that to allow an injured employee, after he has been paid compensation under the State Act, to proceed with

an action for negligence against a third party, would permit the employee to recover double compensation for the same injury and the amounts received under the State Act constitute satisfaction.

Williston on Contracts, Vol. 6 R. Ed., Section 1849, states the same proposition in these words:

> "* * * The acceptance of property in satisfaction necessarily imports an agreement never to enforce the original obligation, and covenants to forbear perpetually were early given effect as a defense, even by courts of law. The reason sometimes given is that such a covenant amounts to a release. The more accurate reason, however, and that generally given in the books, is that circuity of action is thereby avoided."

Plaintiff had no right to accept these drafts and cash them unless he intended to comply with the plain conditions on the face of them. The plaintiff is a well educated young man. The record shows that he is a high school graduate and has had considerable business experience. His claim up to the time he made his arrangements with the insurance company and started cashing the compensation drafts was an unliquidated claim and the drafts constituted an account stated and he would be barred from any further recovery for the same matter after accepting and cashing these drafts. *Williston on Contracts,* Vol. 6 R. Ed., Section 1855, has this to say

with reference to the acceptance of a draft or check with conditions written thereon respecting an unliquidated claim:

> "* * * So if the debtor laid down the check and departed, saying, 'If this is taken it is full satisfaction,' (and similarly if the debtor sends the check with a like notice), and the creditor takes it, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent; and if he indicate by some act or word, not brought home to the debtor at the time that he takes the check, that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is manifestation of assent."

Citing numerous authorities.

Plaintiff acts in receiving and cashing these drafts with the conditions stated on their face constituted an accord and satisfaction. If plaintiff's contention that he did not understand that by receiving these payments and benefits that he was releasing his right to sue his employer, could be considered to be a mistake of fact rather than a mistake of law, plaintiff's outward actions and his repeated manifestations to proceed under the policy would estop him from making any such contention. If it should be considered that the plaintiff did not intend to

give his mental assent to release his claim against his employer, this would not be sufficient under the law to relieve him of his obligations under this contract because of his external acts. As was said by *Holmes, J., in O'Donnell v. Clinton,* 145 Mass. 461, 463; 14 N. E. 747, 751:

> Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words."

And as said by Williston, Vol. 5 R. Ed., Section 1536:

> "* * * Under the guise of conclusive presumptions of mental assent from external acts, the law has been so built up that it can be now expressed accurately only by saying that the elements requisite for the formation of a contract are exclusively external."

The meaning of the words on the draft were clear and unmistakable. The plaintiff's external acts or overt acts as distinguished from his now claim mental assent indicated by everything that he did that he was accepting the benefits under the insurance contract and that he intended accepting the benefits under the insurance contract instead of prosecuting any action at law against his employer.

PLAINTIFF EXCHANGED HIS TORT ACTION FOR ONE IN CONTRACT AND THIS CONSTITUTES SATISFACION.

MacDonald v. Hornblower & Weeks, 268 Mich. 626, 256 N. W. 572;

Burleson v. Langdon, 174 Minn. 264; 219 N. W. 155;

Gibbs v. Redman Fireproof Storage Co., 68 Utah 298; 249 P. 1032;

Hunt, Accord & Satisfaction, Sec. 2, p. 5;

ARGUMENT

These cases dealt generally with facts where an injured person had received an agreement to pay from a tort feasor. The payments had not been completed and the Courts hold the tort action had been exchanged for one in contract and this constituted satisfaction. This rule is stated in *Hunt, Accord & Satisfaction,* Sec. 2, p. 5.

PLAINTIFF HAVING CHANGED HIS CAUSE OF ACTION FROM ONE IN TORT TO ONE IN CONTRACT, IN THE ABSENCE OF PLEADING AND PROVING FRAUD OR MISTAKE HE WILL NOT BE RELIEVED OF THE OBLIGATIONS IMPOSED UPON HIM UNDER THE CONTRACT.

Kight v. Orchard-Hays, 128 Or. 668, 275 P. 682.

Williams v. Adams, 91 S. W. (2d) 951 (Tex.) (1936);

Upton v. Tribilcock, 91 U. S. 45, 50 (23 L. Ed. 203).

ARGUMENT

The law does not allow an injured workman to accept the fruits of a bargain and then turn around and bring another action for the same injuries. The plaintiff here is saying that he did not know the legal effects of the contract under which he was receiving payments. Clearly under the following Oregon decision a person cannot relieve himself from the obligation of a contract by such a contention. As was stated by the Court in *Kight v. Orchard-Hays,* 128 Or. 668, 672:

> "They sought to introduce evidence to the effect that defendants did not read the contract which they signed. It is elementary law in this state that defendants are bound by their contract and are not allowed to contradict a written contract by oral testimony or to say that they did not know the contents thereof without pleading and proving fraud."

In the case of *Williams v. Adams,* the Court states at page 953:

> "In order to recover, the plaintiffs had the burden of showing a right to a cancellation of the written contract of settlement as a condition precedent to a recovery of the damages sought on the merits."

In the case of *Upton v. Tribilcock,* the Court states:

> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."

It is submitted that in the absence of any pleading and evidence of fraud or mistake it was error for the Court to submit the case to the Jury.

INJURED PERSON NOT ALLOWED TO SPLIT HIS DEMAND OR CAUSE OF ACTION.

Ingram v. Carlton Lumber Co., 77 Or. 633 (152 P. 256);

Myhra v. Park, 258 N. W. 515 (193 Minn. 290);

Kidd v. Hillman, 58 P. (2d) 662 (14 Cal. App. (2) 596);

Globe & Rutgers Fire Co. v. Cleveland, 34 S. W. (2d) 1059, 1060 (162 Tenn. 83);

Ierardi v. Farmers Trust Co., 151 Atl. 822 (Del.)

Williston on Contracts, Sec. 686;
34 C. J. 833;

Hunt on Accord and Satisfaction, Sec. 42.

ARGUMENT

The Oregon case of *Ingram v. Carlton Lumber Co.* on this question is squarely in point with the present case. There an injured workman brought action against his employer. He had been paid $150 and had executed an informal release. He did not plead fraud or misrepresentation. He claimed there, as is claimed here, that he thought he was only receiving his loss of wages. The Court says, p. 638:

> "The loss of time resulting from the injury, together with the attendant deprivation of wages, con-

stitutes an element of damage recoverable in an action of this sort. The plaintiff says he understood the paper in question to be a receipt for such prospective wages. Adopting his own construction of it, and still ALLOWING HIM TO PROSECUTE THIS CAUSE, NOTWITHSTANDING THE RELEASE, IS NOTHING LESS THAN PERMITTING HIM TO SPLIT HIS CAUSE OF ACTION.

"It is hornbook law that this is not allowed, and that all the elements of damage relied upon must be included in one complaint, to the end that there shall be but one recovery for the one tort."

Williston on Contracts, under the head of

"Splitting cause of action: Election of remedies, relation to, Section 686,"

considers splitting cause of action and election of remedies on the same footing and under the Section 686 which is indexed as "Splitting cause of action," makes the following statement:

"Where an injured employee has a choice between an action against the person responsible for the injury and compensation under a Workmen's Compensation Act, his filing claim and accepting payments under the Act constitutes an election. (12) citing Holmes v. Jennings & Son, 7 Fed. (2) 231; King v. Union Oil Co., 144 Or. 655; Salt Lake City v. Industrial Accident Comm. (Utah) 17 Pac. (2) 239."

And *34 C. J.* 833, states:

"Entire claim founded on single claim cannot be split."

Myhra v. Park, 258 N. W. 515: Stands for the proposition that all items of damage resulting from single tort form indivisible cause of action and must be included in one suit and further action cannot be maintained on any item voluntarily omitted in ABSENCE OF FRAUD on part of adversary or mutual mistake. *Kidd v. Hillman,* 58 P. (2d) 662:

Holds that single cause of action cannot be split or divided and independent actions brought on each part.

Globe & Rutgers Fire v. Cleveland, 34 S. W. (2) 1059, 1060:

Declares that single tort can be the foundation for but ONE CLAIM for damages. * * * All damages which can by any possibility result from a single tort form an indivisible cause of action.

and again in

Ierardi v. Farmers Trust Co., 151 Atl. 822, it is ruled:

Wrong act of a negligent third person is single and indivisible and can give rise to but ONE LIABILITY.

The rule is well stated by Hunt on Accord and Satisfaction, Sec. 42, page 77, wherein, referring to a tort action, it is said:

"THE CAUSE OF ACTION IS SINGLE AND INDIVISIBLE. An accord and satisfaction by one enures to the benefit of all. BY MAKING THE CLAIM AND ACCEPTING COMPENSATION THEREFOR, all persons against whom an

action might be brought for such injury are released, whether the party with whom the compromise was made could have been legally held in an action for such damages or not."

SPECIFICATION OF ERROR NO. IV

IN FAILING TO HOLD THAT THE ENDORSEMENT OF THE CAMPENSATION DRAFTS AND RETAINING THE FRUITS OF THE CONTRACT CONSTITUTED A RELEASE OF PLAINTIFF'S CLAIM FOR HIS ALLEGED INJURY. (THIS POINT RAISED ON MOTION FOR DIRECTED VERDICT (T. 27).

Davis v. H. P. Cummings Construction Co., 129 Atl. 729; 82 N. H. 87;

Sunlight Coal Co. v. Floyd, 26 S. W. (2d) 530 (233 Ky. 702) (Ky. 1930);

Thornton v. Puget Sound P. & L.. 49 F. (2d) 347;

Otis v. Pennsylvania Co., 71 F. 136;

Hamilton v. St. Louis, K. & N. W. R. Co., 118 F. 92;

Williston on Contracts, Vol. 1, p. 294.

ARGUMENT

The rule is established in this Circuit that a person who has received settlement payment for personal injuries and has executed release cannot retain the fruits and

benefits of his contract and still avoid the effects of the release. The authorities on this subject are correlated in *Thornton v. Puget Sound P. & L.* First there must be a tender back of the payments received under the release contract and further in order to overcome the release or settlement contract there must be affirmatively alleged mistake or fraud. Under the new Federal Rules, this same requirement of affirmatively pleading mistake or fraud pertains. [Rule 9 (C)] Plaintiff plead neither fraud or mistake; nor did he tender back the fruits and benefits of the contract and under the above authorities, it is submitted the Court erred in failing to dismiss this action. The case of *Davis v. H. P. Cummings Construction Co.* is squarely in point. It involves an injured workman who had the right to take the benefits under his employer's insurance contract, which were measured by the State Workmen's Compensation Act, or to proceed with his common law remedy. The employee there, as in the present case, accepted periodic compensation payments. The Court held in the absence of his pleading or proving fraud or mistake, the receipt and acceptance of each one of the drafts for compensation payments was a bar to his action in which he was attempting to sue his employer, as here, for the same injuries.

> "The $15 paid the plaintiff weekly are described in each receipt as being the proportion of his weekly wages under the 'New Hampshire Workman's Com-

pensation Act.' The latter words are just above where the plaintiff signed his name. The plaintiff is barred from maintaining his action for negligence under the common law (Laws 1911, c. 163, Sec. 4; Watts v. Derry Shoe Co., 79 N. H. 299, 109 A. 837). unless, when he signed the release and receipts, he did not have sufficient mentality to transact business or they were obtained by fraud. The receipt and acceptance by the plaintiff of any one of the 17 payments made after the giving of the release would be sufficient to bar the plaintiff's present action. * * *"

And again in the case of *Sunlight Coal Co. v. Floyd,* decided by the Court of Appeals of Kentucky, 1930, 26 S. W. (2d) 530, it was stated by the Court at page 532:

"* * * Inasmuch as appellee had not only asserted a claim under the act, but had accepted compensation under its provisions, there is no escape from the conclusion that the facts were such as would have estopped him from suing at common law, even though he had proceeded before his cause of action was barred by limitation. Kentucky Statutes, Sec. 4882, Allen v. American Milling Co., 209 Ill. App. 73; Lang v. Brooklyn City R. Co., 217 App. Div. 501, 217 N. Y. S. 277; Davis v. H. P. Cummings Const. Co., 82 N. H. 87, 129 A. 729. * * *"

And again in the case of *Florida East Coast Ry. Co. v. Thompson,* (Florida 1927), 111 So. 525, which is a case where the plaintiff was making a similar contention to the one plaintiff is making here, namely, that he thought he was only getting his wages. The Court has this to say, p. 530:

"* * * Defendant did not owe him any wages, but if plaintiff genuinely thought the plaintiff was paying him his wages while he was in the hospital, the sum thereof would not have exceeded $210, yet plaintiff received and accepted $350. By plaintiff's own statement, he knew that part of said sum was 'for the benefit of your (plaintiff's) wife and children,' and hence was not wages."

This very pertinent remark by the Supreme Court of Florida that the plaintiff knew that part of what he was getting was not for wages applies just as forcefully to the plaintiff in the instant case. Because as the plaintiff in this case, while he stated on redirect examination that he thought he was just getting paid for his loss of wages, yet prior to that he had admitted and the record shows that he had made arrangements with the insurance company that his hospital and doctor bills were to be paid and the record shows that these bills were paid in a total sum amounting to over $500.00. In face of this it can be seen by the Court from the record that plaintiff contradicts his own statement, when he says he thought he was only being paid his loss of time.

The provisions of the insurance contract are quite similar to the provisions used by relief departments of railroads which provisions were interpreted by the courts years ago to be of real benefit to an injured employee and

not against public policy. An early leading case concerning one of the railroad contracts is *Otis v. Pennsylvania Co.,* decided 1896, 71 F. 136, in which case it was stated by the Court, p. 138:

> "By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages. He knew, if he accepted the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury happened, two alternative modes were presented to him for obtaining compensation for such injury. With full opportunity to determine which alternative was preferable, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him so to do. And it is not perceived why the court should relieve him from his election in order to enable him now to pursue his remedy by an action at law, and thus practically to obtain double compensation for his injury. * * *"

Then again in the case of *Hamilton v. St. Louis, K. & N. W. R. Co.,* 118 F. 92, it was stated by the Court in pointing out that such a contract is of benefit to an employee, saying, p. 93:

> "It has been held by a long line of cases including some of controlling authority upon this court that

contracts like that in question are not only opposed to sound public policy but are conducive to the well being of those whom they immediately affect. This is so held because the becoming a member of the 'Relief Department' by an employe is entirely optional with himself and because his right to sue for damages resulting from the employer's negligence is reserved to him until after an injury is received, and even then until with full knowledge of all the facts surrounding his case, he makes his election whether to avail himself of the benefits secured to him by his membership in the department or to resort to his action at law for damages. * * *"

Allowing plaintiff to testify as to what he intended, i. e. what his mental assent was is in direct violation of the parole evidence rule. It was objected to at the time and should have been excluded. (T. 145)

Plaintiff's acceptance of the offer even though he may have misunderstood the matter is not grounds for relieving him of the obligations of his contract and actions.

Williston on Contracts, Vol. 1, Sec. 94, p. 294:

"It follows from the principle that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, that a mistaken idea of one or both parties in regard to the meaning of an offer or acceptance will not prevent the formation of a contract. Such a mistake may, under certain circumstances, be ground for relief from the enforcement of the contract. But this relief is in

its origin equitable, and is in its nature a defense to the enforcement of the contract of which advantage may or may not be taken, rather than a defect in the formation of the contract. It follows that the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. The sound view has been well expressed by L. Hand, J.: 'A contract has strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.' "

There being no pretense of mutual mistake or fraud, it was the duty of the lower Court to hold the plaintiff to his contractural arrangement and dismiss this action.

SPECIFICATION OF ERROR NO. V

The Court should have construed the written documents and the legal effect thereof and instructed the Jury accordingly rather than to submit the written documents, namely, the insurance policies and drafts to the Jury to construe the legal rights of the respective parties thereunder. (Raised on motion for new trial (T. 27), also in connection with instructions (T. 175).)

"Mr. Powers: I will object to the Court's instruction with respect to the insurance policies, leaving to the Jury the question of what the contract and the other documents are, to construe the agreement. My position is that it is for the Court to construe the written documents. * * *"

1930 *Oregon Code,* Sec. 2-305;

Anderson v. Hartford Accident & Indemnity Co., 152 Or. 505 (53 P. (2d) 710, 54 P. (2d) 1212).

ARGUMENT

The uncontroverted facts that plaintiff received these drafts as compensation in connection with his same injuries after making demand on the insurance adjuster and the drafts referring to an insurance policy and as plaintiff stated that he supposed there was a policy behind the payments, required the Court to construe the legal effect of the contractual relationship. Plaintiff's claim now of "non mental assent" or "silent mental reservation" is belied by his overt acts and is insufficient to overcome this contract arrangement. Section 2-305 of the Oregon Code, 1930, imposes upon the Court the duty to construe instruments in writing. The material part of this statute reads as follows:

"* * * the construction of statutes and other writings * * * are to be decided by the court * * *"

The Supreme Court of Oregon in the case of *Anderson v. Hartford Accident & Indemnity Co.* construed an identical provision from an identical policy as a matter of law. It was a case in which was involved a policy and workmen's compensation endorsement thereon identical in language to that in the present case, it was contended by an injured employee that he should not be bound by the provisions of the policy, that they were "not incorporated in and made a part of (the) contract" between himself and defendant. The plaintiff there did not know the terms of the policy and was in much the same position as plaintiff is in here. However, the Supreme Court of Oregon held that under the dealings of the parties the policy was part of their contract and the provisions of the policy had to be considered in determining contractural relationship. The Court said, p. 510:

> "In accepting the view that the provisions of the insurance policy as to payment of benefits became a part of the contract between the plaintiff and the defendant, the provision of the policy as to arbitration is not to be disregarded, and it should be borne in mind that compliance therewith is as essential as the observance of any other term or condition of the agreement."

In that case the pertinent provision of the contract had to do with medical arbitration. Here in our case the pertinent provision of the contract is that compensation

when accepted is "* * * in lieu of all other claims or demands because of such injury." (T. 157).

And the Trial Court as a matter of law should have construed this provision of the contract as binding upon the plaintiff and dismissed the within action.

SPECIFICATION OF ERROR NO. VI

Assuming it was proper to submit issue to Jury, Court should have instructed Jury to reduce pro tanto from any recovery the amount already received by plaintiff by way of compensation payments and payments made for his benefit for medical expense.

The Court erred in failing to instruct that the verdict would have to be reduced pro tanto (T. 176):

> (Mr. Powers) "It appears that there has been paid to the plaintiff and for his benefit something in the neighborhood of—I haven't the complaint here, but over $750.00, seven hundred and fifty or some such amount, and the evidence shows that that was paid after the alleged second injury. It seems to me that the jury ought to be instructed in that regard some way. * * *"

DEFENDANT ENTITLED TO HAVE VERDICT REDUCED PRO TANTO IN AMOUNT PAID PLAINTIFF.

ARGUMENT

In any event the amount already paid to the plaintiff and paid for the plaintiff's benefit should have been credited on verdict..

Mandeville v. Jacobson, 189 Atl. 596 (Conn. 1937), 598:

> "The amount paid for a release should be credited on the verdit or judgment rendered. Beckwith v. Cowles, supra, 85 Conn. 567, at page 571, 83 A. 1113; Union Pac. Ry. Co. v. Harris, 158 U. S. 326, 333, 15 S. Ct. 843, 845, 39 L. Ed. 1003; Ingram v. Carlton Lumber Co., 77 Or. 633, 643, 152 P. 256, 259; Sanford v. Royal Ins. Co., 11 Wash. 653, 664, 40 P. 609, 612; 63 C. J. 1234."

It is to be noted that this recent Connecticut case cites in support of this doctrine the Oregon case of *Ingram v. Carlton Lumber Company.* It is submitted that the Court's failure in his charge to the jury to in any way take into consideration the amount which had been paid to the plaintiff and for his benefit was error. Certainly it would allow double compensation; it would allow the plaintiff to have his cake and eat it too.

CONCLUSION

It is respectfully submitted the Court erred with respect to each specification of error raised on this appeal.

Plaintiff assumed the risk because the risk was an ordinary one incident to his employment; because he used his own appliance; because he had comparative knowledge or equal knowledge with his employer; because the jack is a simple tool; because plaintiff created his own working conditions; because there is no duty on the employer to furnish the latest and most improved appliances. Moreover to permit this judgment to stand would permit plaintiff to receive double compensation for the same injury; it would permit him to split his demand and cause of action; it would permit him to retain the fruits and benefits of his contract without being held to its obligations; it would relieve him from his election to accept compensation which is imposed upon all workmen who are paid compensation under the terms of the State Workmen's Compensation Act; it would render nugatory the settlement including all the releases signed on the back of each draft without any pleading or proving of fraud or mistake. Contracts voluntarily entered into by parties should be upheld. Settlements are favored by the law and it is earnestly urged that the defendant under the law is entitled to have this judgment reversed.

Respectfully submitted,

James Arthur Powers,
Attorney for Appellant.

No. 9277

United States Circuit Court of Appeals

For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA,
a Corporation,
Appellant,
vs.
JAMES RALPH HUNT,
Appellee.

Brief of Appellee

Appeal from the District Court of the United States for the District of Oregon.

JAMES ARTHUR POWERS,
Attorney for Appellant.

GEO. L. RAUCH,
Attorney for Appellee.

SUBJECT INDEX

	Page
FURTHER STATEMENT OF THE CASE	1
SUMMARY	23
of Answering Arguments	
DENIAL OF COMMON-LAW DEFENSES BECAUSE WORKMEN'S COMPENSATION LAW REJECTED	24
Hazardous Occupation	
Statute	
DEFINITIONS	25
Statute	
ELECTIVE PRIVILEGE OF EMPLOYER—COMMON-LAW DEFENSES ABROGATED	26
Statute	
ARGUMENT	27
Rejection of Statute	
NO MEETING OF MINDS	28
Argument	
SPECIFICATION OF ERROR NO. I	45
Answering Argument	
DEFENDANT'S POINT ENTITLED—EMPLOYEE CREATING OWN WORKING CONDITIONS	71
Answering Argument	
HIS OWN TOOLS	73
Answering Argument	
COMPARATIVE KNOWLEDGE	74
Answering Argument	
WORK BEYOND HIS PHYSICAL CAPACITIES	75
Answering Argument	
SPECIFICATION OF ERROR NO. II	76
Answering Argument	
SPECIFICATIONS OF ERRORS, III, IV, V AND VI	79
Answering Argument	

INDEX OF CASES

Page

Anderson v. Hartford Accident & Indemnity Co., 152 Or. 505; 53 P. (2d) 710; 54 P. (2d) 1212 30-44

Bevin v. Oregon-Washington R. & Nav. Co., 136 Or. 18; 298 P. 204 59-63-75

Christie v. Great Northern Railway Co., 142 Or. 321; 20 P. (2d) 377 61

City of Timpson v. Powers, 119 S. W. (2d) 145; Tex. 73

Dinuhn v. Western N. Y. Water Co., 297 N. Y. S. 376; 252 App. Div. 51 73

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1, 7 P. (2d) 796 62

Hollopeter v. Palm, 134 Or. 546, (291 P. 380; 294 P. 1056) 27-28

John J. Craig Co. v. C. E. Chambers, 13 Tenn. App. 570 79

Makino v. Spokane, Portland & Seattle Ry. Co., 155 Or. 317; 63 P. (2d) 1082 60-61

New York, N. H. & H. R. Co. v. Vizvari, 210 F. 118 (C. C. A.) N. Y. 79

Northwestern Pacific R. Co. v. Feidler, 52 F. (2d) 400 61

Nugent Sand Co. v. Howard, 11 S. W. (2d) 985, Ky. (1928) 79

Parker v. Norton, 143 Or. 165, 21 P. (2d) 790 63

Phillips v. Keltner's Adm'r., 124 S. W. (2d) 71; 276 Ky. 254 72

Quanah, A. & P. Ry. Co. v. Gray, 63 F. (2d) 410 (C. C. A.) Tex. (1933) 78

Shields v. W. R. Grace & Co., 91 Or. 188 58

Thompson v. Pennsylvania Railroad Co., 88 F. (2d) 148 64

Page

Walker v. Ginsburg et al., 244 Mich., 568; 222 N. W. 192..... 64

Webster's New International Dictionary, 1925 Ed., page 1786.... 37

Wike v. Oregon-Washington R. & Nav. Co., 83 Or. 678, 163 P. 825 63

1935 Ore. Code Supplement, Sec. 49-1815; Ore. Laws 1935, ch. 32, par. 1, page 41..... 24

1935 Ore. Code Supplement, Sec. 49-1817; Ore. Laws 1935, ch. 50, par. 1, page 68..... 25

1935 Ore. Code Supplement, Sec. 49-1819; Ore. Laws 1935, ch. 25, par. 1, page 28.....26-46

No. 9277

United States Circuit Court of Appeals

For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA,
a Corporation,
Appellant,
vs.
JAMES RALPH HUNT,
Appellee.

Brief of Appellee

Appeal from the District Court of the United States for the District of Oregon.

FURTHER STATEMENT of the CASE

Defendant rejected by positive act the Workman's Compensetion Law of the State of Oregon, which rejection became effective on July 1, 1934, and continued at and long past the time of the accident complained of, or November 5, 1934, to at least October 3, 1938, or the time of filing Defendant's Amended Answer to Second Amended Complaint. Please see Paragraph VII (T. 8) Second Amended Complaint

and Paragraph II (T. 10) Amended Answer admitting the same.

Defendant's business during this time was that of conducting and controlling a workshop where power driven machinery was used and manual labor was exercised for gain in the repairing and adapting of articles and parts of articles and machines, namely: automobiles and the tires thereof where Plaintiff worked.

These facts were admitted or assumed throughout the entire transcript but are especially shown by Defendant's Exhibits 2, 3, 4 and 5, which are photographs of the workshop or filling station showing the electric motor and air compressor and the hydraulic hoist and pumps driven by their power and showing the workmen repairing or adapting an automobile tire, pictures omitted by mistake from the Transcript of Record herein (T. 149) but by order correctly included in the Supplemental Transcript herein.

Which Supplemental Transcript also contains that portion of the testimony of Ernest H. Coats omitted from the Transcript by error.

(Supplemental Transcript 1 and 2)

Q. Now, do you know what equipment with

which the station at Fargo and Union was furnished during that period between the middle of June, 1934, and the 5th of November, 1934?

A. Equipment, sir?

Q. Yes. Do you know with what equipment it was furnished during that period of time, the station?

A. I know that it had the regular service station equipment, a hoist, air compressor, pumps, and of course air lines and anything that goes with the compressors, tools, tire tools.

Q. Do you know what air pressure was carried?

A. 180, sir.

Q. How is that?

A. 180 pounds.

Q. 180 pounds. Do you know for what it was used?

A. It was used, for one thing, to lift the hoist, to force the oil into the cylinders to lift the hoist; it was used for pumping up tires, and so on and so forth.

Q. Do you know anything about what made

the compressed air? What kind of machinery was used?

A. It was an electric motor run by 220 volt of electricity.

Q. 220 volt current?

A. Yes.

Q. And motor?

A. And motor, yes.

Q. And what did the motor run, in turn?

A. The motor run the machinery that compressed the air.

Q. And how was this air brought to the hoist to push the oil up into it like you said?

A. It was piped from the service building, from the front office back to where the air compressor was back to the hoist with small pipes.

Q. I will ask you what if any machinery did you service as a business at that location?

A. We serviced trucks, many trucks, many truck tires, and ——

Q. Did you service only trucks?

A. Passenger cars.

Q. Trucks and passenger cars?

Defendant (T. 153-160) introduced as its (Exhibit No. 26) a policy of indemnity against employer's liability in which the assured was the Union Service Stations, Inc. This company, though named as a defendant in the complaint, ceased to be a party in this cause long before its submission to the jury. This policy was numbered US519380 and expired July 1st, 1934, the day Plaintiff ceased to work for Union Service Stations, Inc. The accident for which Plaintiff's judgment herein was rendered, did not occur until November 5th, 1934, upon which later date Plaintiff was working for Defendant, Union Oil Company of California.

Defendant at (T. 160) also introduced as Exhibit 27 a policy in which it is the assured and which is identical in form with its Exhibit 26 above. This policy was numbered 543014.

The only evidence of any payments to Plaintiff by Defendant on account of the accident here involved, of November 5, 1934, are Defendant's Exhibits 10 and 11 and refer to another or third policy in which Defendant is the assured and which is numbered 543012. This policy 543012 was never introduced nor offered

in this case nor any of its terms or conditions in any way made known or proven (T. 151-153), although ample opportunity was given Defendant to explain twice when Learned Counsel for Defendant gave the insurance adjuster, Mr. Hadfield, a direct suggestion to do so.

(T. 136.)

"Mr. Powers: Q. Do you have the original policies with you?

A. I have two of them here." (Interruption.)

"Q. Mr. Hadfield, I was asking you about the drafts, and I notice one bears the number 543012, and one bears the number of 519380, giving policy numbers. How is it that there were two different policy numbers there on the drafts?

A. Well, that would come on the expiration of one policy and another one started. These policies run for a year at a time."

(T. 138.)

"Q. Now, I see that there are two different policy numbers referred to on the the drafts. That is, one draft here of March the 11th, 1935, bears policy numbers 543012. Can you tell me which policy that ——" (Interruption.)

No explanation was made by the insurance man at

either of these opportunities to show why policy No. 543012 or its terms were not introduced in evidence.

And then after Plaintiff testified as follows:

(T. 144 to 145)

"Q. Now, I am referring to the letters which I introduced which stated that you were being paid for your second accident of November 5th, 1934, and ask you if you ever received anything or any draft at any time relating to the second policy which you hold in your hand?

A. No, I didn't.

Mr. Powers: What is the number of that policy?

Mr. Rauch: Q. What is the number you hold?

A. 543014.

Q. Did you get something for loss of time on account of your second injury?

A. Yes, I did.

Q. Now, why do you say that you never received anything on account of the second injury in any way relating to or with respect to the second policy? And before you answer I am handing you Defendant's Exhibit 10 and Defendant's Exhibit 11, which are drafts that re-

fer to the accident of November 5th, 1934, and ask you why you say you never received anything under the second insurance policy?

A. I say that because the numbers on the checks refer to different policies.

Q. That money that you received then does not refer to this second policy at all?

A. No, sir."

One of these payments under policy numbered 543012 Exhibit 11 was changed from compensation for a segment of time lost because of the accident in question to be for another accident of June 11, 1934, a date upon which Plaintiff was not working for Defendant (T. 152).

Other drafts, Defendant's Exhibits 12, 14, 15, 16, 17, 18 and 19, made to Plaintiff were for short segments of time lost because of the accident of June 11, 1934, with the Union Service Stations, Inc., a stranger to the judgment herein, the then employer of Plaintiff, the assured, and under its policy numbered 519-380, which policy in no way affected the relations between Plaintiff and Defendant and which expired before the latter began. (T. 152-153)

(T. 114 to 115)

"A Juror: Is there any significance to that?

Mr. Powers: No.

The Juror: Oh. That is all right, then.

The Court: Let me see the checks.

(The checks were handed to the Court.)

Mr. Powers: Now, these checks—

The Court: Mr. Powers, just a minute.

Mr. Powers: Yes."

(T. 116 to 117)

"The Court: I think I want to make some statement to the jury about them. Just so we keep these dates straight, gentlemen of the jury, the plaintiff now has fixed the time of the accident for which he is suing as November 5th, 1934. He testified that he hurt his back earlier in the year, in June, 1934. He went to the hospital in—

Mr. Powers: February 28th, '35.

The Court: In 1935. These checks run through '34 and '35, and later in the case after it is all in there may be some questions for your determination as to the place in the case of all of the dates, including the dates on the drafts.

(Mr. Powers thereupon explained Defendant's Exhibits 9 to 21, inclusive, further to the jury.)

The Court: I want to make this further statement to the jury, Mr. Powers.

Mr. Powers: Yes, your Honor.

The Court: That insurance policy insured the company for which the plaintiff worked up to July, 1934.

Mr. Powers: July 1st, 1934, yes, your Honor.

The Court: Yes. When he was first injured, which is not the injury he is suing on here, in June of '34, he was working for the company that that policy insured, and that company is not now in the case; and that insurance ran out by its terms, did it not, Mr. Powers?

Mr. Powers: Yes, your Honor.

The Court: At the end of June, 1934?

Mr. Powers: That is correct.

The Court: That insurance was not in force at the time when he claimed he was injured later in November, the case for which he is suing here, and that insurance did not insure the employer for whom he was working in November, '35, when he claims he was injured, the injury which he claims he suffered for which he is suing here. All those things will have their place at the time of the instructions and will be dealt with by the lawyers in their arguments.

(T. 134 to 136)

"The Court: Well, now I will tell you, Mr.

Rauch. I am not going to pin myself down to the particular dates that are written on these drafts, and I would be willing to sit here and listen to you for a long while gladly if I really thought that you were surprised by this and that your case was affected by it, but I don't see that, and it may be necessary to amend the pre-trial order, I am not sure of that. I will look up the rule pretty soon, but if we were just trying this case, Mr. Rauch, without the pre-trial in the old fashioned way, and a man came in here with two policies instead of one, we would just treat that as a routine development on the other side, and I don't see that you have been kept from any preparation you could have made. You still have your rebuttal.

Mr. Rauch: Well, if your Honor views it that way I will withdraw my objection.

The Court: I am going to tell the jury at the end, if the case goes to the jury, unless Mr. Powers can persuade me as a matter of law that this is a release, and that is not my feeling just now, I am just going to give this to them as to whether there was a meeting of the minds on a settlement, if it goes to the jury. That is my present feeling, that the situation is part in parol and part in writing, but I shall leave it all to the jury to pass on that question. And so I will admit that policy.

(The policies of insurance so offered and received in evidence were marked Defendant's Exhibits 26 and 27, respectively.)

(T. 141 to 142)

Mr. Rauch: I still object, your Honor.

The Court: Now, gentlemen, maybe I am the only one here that understands about the policy business, or maybe I am the only one that misunderstands. You can correct me if I am wrong. I understand that this man worked for the Union Service Stations until July. He had his first injury in June while he was working for those people.

Mr. Powers: Yes, your Honor.

The Court: During that period Union Service Stations had one of these policies.

Mr. Powers: That is correct.

The Court: Which ran out at the end of June. He began to work in July for the Union Oil Company and during that employment and in November he was hurt, so he says, the second time, which aggravated his prior injury for which he is suing here now, and during that period Union Oil Company had a policy of the same kind and with the same company.

Mr. Powers: That is correct.

The Court: And you claim that these drafts

were paid under both of those policies, some under one policy and some under another policy.

Mr. Powers: That is correct, your Honor.

The Court: And that is all there is to that now, isn't it?

Mr. Powers: Except that there was some reason why, when they first started paying under the second policy, the Union Oil Company policy, to show why they went back and started charging it up to the first policy again, the operation and the claim from November 5th."

Defendant at all times including the trial denied that Plaintiff had been injured by a falling car and maintained that his condition was a recurrence of his former injury of June 11, 1934 (T. 132 and 133), though they made one payment on account of a segment of time lost because of the accident of November 5, 1934, but under the unknown policy numbered 543012 (T. 151), but immediately reverted to their contention that the injury of the later date was a recurrence of the injury of June 11, 1934, while he was working for the Union Service Stations, Inc. (T. 142 and 163). This confusion in Defendant's mind also appears from the reference on page 10 of its brief referring to its declaration that the operation was to cure a congenital and chronic condition while on page

5 of its brief it states "car slipped off the jack and struck his back in the region of his sprain" as it does at (T. 106) "and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back," though Defendant's witness, the claims adjuster, Mr. Hadfield, testified: (T. 133)

> "Mr. Powers: Q. And did he tell you that any car had fallen on him at any time?
>
> A. No, sir."

The resulting confusion in Plaintiff's mind is shown by his testimony.

> (T. 145 to 146)
>
> "Mr. Rauch: Q. When you received those checks marked for the accident of November 5th, 1934, what did you understand you were receiving?
>
> A. I understood I was receiving my time for the accident that happened to me. It was just payment or compensation for time lost.
>
> Q. Lost on account of what?
>
> A. Well, the first injury, and I saw the dates on there and I though possible there was a mistake, to the second accident and the aggravation of the first injury."

Defendant or his dependents at no time signed any general release or release of any kind except the endorsements on the drafts which were a receipt in the case of each check for the "account stated on the other side" which was a separate account in each draft for compensation for just the exact time lost between the dates therein named as therein computed. (T. 151 and 152.) If the unknown terms of policy 543012 under which the payments were made for the accident of November 5, 1934, or Defendant's Exhibits 10 and 11 (T. 152) were the same as those of policies numbered 519380 and 543014 or Defendant's Exhibits 26 and 27, then it contained the provisions:

(T. 158)

> "If such injured employee or his dependents accept the first payment on account of compensation, he or they shall at that time execute a general release relieving this Employer and the Company from all further obligation for compensation in manner and form as agreed."

However, there is nothing in this case to show what were the provisions of policy 543012.

That agreement of settlement and accord ever existed, with respect to the accident of November 5, 1934, by parole is repeatedly, consistently and absolutely denied by Plaintiff.

(T. 113 to 114)

"Q. And you had a choice then of going on and taking those compensation payments and having the bills paid for you or else suing the Union Oil Company, isn't that so? You could do one or the other?

A. Well, I imagine so. At the time I was interested in getting well.

Q. Yes, and you thought it was better to take these compensation payments and have your bills paid than to go into a lawsuit with them?

A. I didn't think anything about that.

Q. Well, that was the proposition, wasn't it, whether you would take the compensation payments and the—

A. There was nothing—well, they told me that they would pay my salary in the form of compensation, yes.

Q. Well, wasn't that your understanding?

A. They didn't mention anything about a lawsuit, and I didn't either.

Q. Well, wasn't it understood there that these payments would be made under that policy to you in lieu of any claim that you would have?

A. No, sir, I was never asked about that.

Q. Did you understand that they were paying you there and paying these bills and that you could still sue them for this same injury?

A. I didn't under — there was nothing said about that. They said they would pay me compensation and there was nothing said about suing anything, and I didn't understand one way or the other."

(T. 143)

"Q. Now, at the time, whether by the signing of the check or in any manner, did you ever agree with any person to waive your right to claim for injuries to yourself, your body, your person, on account of the accident of November 5th?

A. No, I didn't."

(T. 144)

"Q. Did you ever agree to accept anything under that policy in consideration of the settlement of your claims against the Union Oil Company?

A. No, sir."

(T. 146)

"Q. Did you ever accept any money at any time from this defendant or its insurance company for any other claim than this compensation, for any other claim or for any other reason or

thing for this compensation which you state is for time lost due to the operation, the first accident, aggravation of that, and the second accident?

A. No, sir."

There is no contradiction by any of Defendant's witnesses of Plaintiff's strong testimony last above, nor any claim by them that a general release or waiver of his right to sue for his injuries was ever had from Plaintiff either by writing or parol.

Defendant emphasizes by italics in its Brief at page 7 a statement that Plaintiff inquired concerning what the insurance company would do, but when the evidence in question and answer form is examined it is easily seen that the inquiry was only an accompaniment of Defendant's manager, Mr. Russell, and limited entirely to the matter of partial compensation for time loss because of what Mr. Hadfield, the adjuster, decided was a recurrence of the injury of June 11, 1934, after Defendant had compensated Plaintiff in full for his time for the same accident from June 11, 1934, to February 28, 1935, although Plaintiff had fully informed them of the fall of the car upon him on November 5, 1934.

(T. 70)

"A. I was wearing the brace at all times and

I would go out and get credit card applications and I would run errands and help him around the office, and during this time I was on full time payments.

"Mr. Russell says, 'We don't want to report this as loss time accident' "—

(T. 71)

"Q. Yes, and how long did you continue that?

A. Well, I continued that from shortly after I was hurt up until the 28th day of February, 1935.

Q. What happened then?

A. On the 28th day of February, 1935, I received instructions that I was to go to the hospital for an operation, which I did, and on the 1st day of March, 1935, they operated on me."

(T. 109)

"Cross examination:

Q. Then you got your wages right through from July 1st, 1934, or for that matter, in June also of 1934, the time the first accident occurred, you got your wages right through up to the time you went into the hospital?

A. Yes, sir.

Q. Then when you went into the hospital for the operation you got compensation payments?

A. That is right."

(T. 111)

"Q. Did you know that you were going to receive compensation payments when you were in the hospital?

A. Yes, sir.

Q. How did you know that?

A. Well, Mr. Russell told me that when I went to the hospital that I would go off of full salary."

(T. 112)

"A. The day before the operation Mr. Russell and I went down and talked to Mr. Hadfield and he asked me how much I was making a month, and he told me the percentage I would be paid every two weeks on my salary."

(T. 129)

"A. Mr. Russell explained to Mr. Hadfield that it was necessary for me to have an operation, and when I got down there he asked me about my back, and what had happened, and I told him just what had happened, and all he did was to tell me what percentage I would get of my salary. He asked me approximately how much I was making a month."

(T. 67)

"A. And I talked to Mr. Russell and explained to him just what had happened to me, that I had jacked this car up and it had fallen down and struck me across the hips."

(T. 106.) It is stipulated at line 8: "and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back." It should be remembered that all the payments to Plaintiff, except one, were for the accident of June 11, 1934.

There was no attempt at a settlement for pain and mental suffering, before, during or after the operation and the bodily impairment resulting, and at that time neither of the parties knew what a fusion operation was, and no further conference was had.

(T. 133)

"A. Mr. Hunt and Mr. Russell came over to the office and said that Dr. Dillehunt had recommended this fusion operation, and I didn't know what it was myself. I hadn't had any experience with it before, and so I asked him just what the operation meant. He informed me of what they would have to do to the joints there, and so I asked him at that time how that happened. He stated that he had sprained his back as the result

of changing a tire, and I told him we had had a report of an accident in June of the same thing and he said yes, it was a recurrence of the first injury."

(T. 110 to 111)

"A. Well, Dr. Dillehunt told me that it was a very—that it was a tough operation, he told me that, and he didn't say how they would perform it or how they would do it, he just told me it would be a bad operation and he told me that I would probably be in the hospital for three or four months. Outside of that, that is about all that was said. I couldn't find anyone else that had ever had a spinal fusion."

(T. 121)

"A. No, I never talked to the Hartford people after I got out of the hospital."

That Plaintiff had actual injuries and damages for pain and injury immediately after the fall of the car upon him, the Transcript of Record shows at (T. 61 to 66); his suffering and confinement at home and when he returned to Defendant's office at (T. 67 to 72); his experience and suffering including mental anguish at (T. 73 to 79); the hardship of his convalescence at home at (T. 80); the permanent impairment of his body and the constant continuing pain

and the handicap to his earning power at (T. 81 to 85). Witness Everett L. Keith describes Plaintiff's condition immediately after the accident at (T. 91).

SUMMARY

(a) Defendant at the time of the accident or November 5, 1934, was engaged in a hazardous occupation and had rejected the Workman's Compensation Law of Oregon, and such rejection was then in effect, and that it was no defense for it to show;

That any negligence of Plaintiff, other than his willful act, committed for the purpose of sustaining the injury complained of, contributed to the said accident, or

That Plaintiff had knowledge of the danger or assumed the risk which resulted in his said injury.

(b) All the writings introduced in this case failed to show any contract or terms under which anything was paid to Plaintiff or accepted by him, on account of the accident complained of which occurred November 5, 1934.

(c) That no insurance policy was introduced in this case under the provisions of which Plaintiff ever received anything for his injury of November 5, 1934.

(d) All of the parol evidence introduced in this case failed to show any contract or terms under which anything was paid to Plaintiff or accepted by him on account of the accident of November 5, 1934, for his pain and suffering in general and the permanent consequences of his impaired earning power and use of his body and his continued and future pain and suffering or any of them.

(e) That from all the evidence in this case, written and parol, the jury was justified in finding that Plaintiff considered and understood that the payments which were made to him were for compensation for time lost and for medical and surgical care and for neither of which was he suing in this case.

AN EMPLOYER IN OREGON ENGAGED IN A HAZARDOUS OCCUPATION WHO REJECTS THE WORKMEN'S COMPENSATION LAW IS DEPRIVED OF THE COMMON LAW DEFENSES, INCLUDING CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK.

1935 Oregon Code Supplement, Sec. 49-1815; Oregon Laws 1935, ch. 32, par. 1, p. 41:

"HAZARDOUS OCCUPATIONS.

If an employer is engaged in any of the occupations defined by this act as hazardous, the

workmen employed by him in such occupations are deemed to be employed in a hazardous occupation, but not otherwise. The hazardous occupations to which this act is applicable are as follows:

(a) When power-driven machinery is used, the operation of printing, electrotyping, engraving, photoengraving, lithographing or stereotyping plants, laundries, irrigation works, grain warehouses, factories, mills or workshops;"

1935 Oregon Code Supplement, Sec. 49-1817; Oregon Laws 1935, ch. 50, par. 1, p. 68:

"DEFINITIONS.

When used in this act words shall mean as follows:

'Workshop' means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of any article, machine or thing, over which plant, yard, premises, room or place the employer of the person working therein has control.

'Mill' means any plant, premises, room or place

where machinery is used for any process of manufacturing, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are part of the plant, including elevators, warehouses and bunkers."

1935 Oregon Code Supplement, Sec. 49-1819; Oregon Laws 1935, ch. 25, par. 1, p. 28:

"ELECTIVE PRIVILEGE OF EMPLOYER—COMMON-LAW DEFENSES ABROGATED.

Before becoming engaged as an employer in any hazardous occupation defined by this act, such employer may file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund, and thereupon shall be relieved from all obligations to contribute thereto. Such employer shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act as if this act had not been passed. In any action brought against such an employer on account of an injury sustained by his workmen, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that

the negligence of the injured workman, other than his wilful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."

Hollopeter v. Palm, 134 Or. 546 (291 P. 380, 294 P. 1056).

ARGUMENT

With the admissions that the Workmen's Compensation Law had been rejected, which rejection was still in effect at the time of the accident (T. 8 and 10), and Defendant's Exhibits 2, 3, 4 and 5, and the testimony of Ernest H. Coats, Supplemental Transcript, 1 and 2, and the entire testimony of the case showing that Defendant was running a workshop, yard or place where power-driven machinery was employed and manual labor was exercised by way of trade for gain or otherwise in or incidental to the process of repairing or adapting for sale or otherwise, articles or parts of articles, namely, automobile and automobile tires, at the said time complained of, November 5, 1934, and that at such time Defendant had control of such workshop, yard or place, no words of the writer can make more plain the application of the law above

printed. No breath of suggestion has been made that Plaintiff's acts were wilful negligence, so under authority of *Hollopeter v. Palm*, above cited, as stated at page 564 thereof, Defendant is denied the defenses of contributory negligence and assumption of risk.

THERE WAS NO MEETING OF MINDS ON A SETTLEMENT BETWEEN THE PARTIES HEREIN WITH RESPECT TO PLAINTIFF'S GENERAL DAMAGES FOR THE ACCIDENT OF NOVEMBER 5, 1934.

ARGUMENT

Defendant admits that it had rejected the Workmen's Compensation Law, and was not under it on November 5, 1934; but declares that it carried an insurance which provided benefits for its injured workmen. (Defendant's Brief, page 6.)

The only insurance policy under which it ever paid Plaintiff anything (Defendant's Exhibit 10) for the accident of November 5, 1934, was one numbered 543012. (T. 151, 152 and 153.)

It made another draft (T. 152; D. Ex. 11), but changed the payment to one for the accident of June 11, 1934, after it was originally drawn for the acci-

dent of November 5, 1934. This draft was also under policy numbered 543012.

This policy was never introduced at the trial nor any of its terms in anyway put in evidence or referred to. Its absence was never explained, though the Learned Counsel for Defendant twice gave the insurance man an opportunity to do so at (T. 136) and again at (T. 138), and Plaintiff pointed it out most forcefully at (T. 144 and 145). As far as this case is concerned, it never existed.

Counsel in his brief at page 6 refers to (T. 153, D. Ex. 26), but he must be in error, for Defendant's Exhibit 26 is a policy between the insurance company and the Union Service Stations, Inc. It, also, had expired July 1, 1934, more than three months before the accident of November 5, 1934. (T. 154.)

However, this is the policy numbered U S 519380 under which all the other payments were made to Plaintiff and they for the accident of June 11, 1934. (T. 152 and 153 and Def. Exs. 12, 14, 15, 16, 17, 18 and 19.)

Perhaps Counsel meant Defendant's Exhibit 27, which is a policy in which Defendant is the assured.

Just why this policy was introduced is hard to see because nothing was ever paid under it.

No settlement of Plaintiff's general damages could have been made under either Defendant's Exhibits 26 or 27, because they contain the following clause (T. 158):

> "If such injured employee or his dependents accept the first payment on account of compensation, he or they shall at that time execute a general release relieving this Employer and the Company from all further obligation because of such injury except the obligation for compensation in manner and form as agreed."

What this particular insurance company means by a "general release" is shown by the case cited by Defendant of *Anderson v. Hartford Accident & Indemnity Co.*, 152 Or. 505—53 P. (2d) 710, 54 P. (2d) 1212, at pages 507 and 508. This general release was exacted in this case before anything was paid the workman, just as was provided in the policy with the Union Service Stations, Inc., No. U S 519380, or Defendant's Exhibit 26. Also, after the payments in that case ceased, as the Court states on page 508 thereof:

> "the plaintiff signed a document designated as a release and settlement of claim, in which the

above amounts were itemized and it was recited that in consideration of the payment of said amounts to the plaintiff by the Hudson company, the plaintiff released and discharged the said company 'from any and all actions, causes of action, claims and demands, damages, costs, loss of services, expenses, and compensation on account of and in any way growing out of any and all known and unknown personal injuries . . . resulting or to result from 'the accident.' "

In the case at bar there is no claim by Defendant that any general release was ever executed by Plaintiff, and he repeatedly and categorically denies any such release as at (T. 145 and 146). Defendant's Exhibits 10 and 11 show they were for compensation for lost time only.

For some reason which does not appear, the insurance company in the within case did not consider itself bound to Defendant under any policy, surely not under U S 543012 or U S 543014, but only to the Union Service Stations, Inc. (D. Ex. 26 or U S 519380.)

(T. 133.)

"A. There had been some time elapse from the injury of June the 11th, and there was a little question as to whether or not we would take

care of those payments, and for that reason Mr. Russell had telephoned me. He said they would like to come over and talk to me about it. They came over, and ——" (Interruption.)"

The insurance company made a mistake and paid one payment for lost time under a policy for which it was not bound (D. Ex. 10) and under policy No. 543012 (T. 151) on account of the accident for which Plaintiff sues or of November 5, 1934, and then corrected it immediately after it had made a draft, also under policy No. 543012, for the accident of November 5, 1934, to read for the accident of June 11, 1934 (D. Ex. 11), and then made all the rest of its payments for time lost on account of the accident of June 11, 1934, for which it was bound to pay, but under policy U S 519380, to the Union Service Stations, Inc., an entirely different person from the defendant (T. 153 and 154 and D. Ex. 12, 14, 15, 16, 17, 18 and 19), conclusively disproving any intent to settle with Plaintiff for his general damages resulting from the accident of November 5, 1934.

Defendant at all times up to and during the trial maintained that Plaintiff's injury of November 5, 1934, was a recurrence of the injury of June 11, 1934, and had so reported it to the insurance company.

(See Defendant's Brief at bottom of page 10, also (T. 133).

> "He stated that he had sprained his back as the result of changing a tire, and I told him we had had a report of an accident in June of the same thing and he said yes, it was a recurrence of the first injury.
>
> Mr. Powers: Q. And did he tell you that any car had fallen on him at any time?
>
> A. No, sir."
>
> (T. 142.)
>
> A. I said Dr. Dillehunt informed us this a recurrence of July the 11th. * * *
>
> "A. Yes. Dr. Dillehunt informed us that it was November 5th injury was a recurrence of the injury of June 11th."

but now upon appeal it states in its brief at page 7:

> "The claims adjuster was already acquainted with plaintiff's prior accident of June 11, 1934, and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back,"

as it stipulated was the fact (T. 106). This is apparently what the jury believed; and as Witness Ever-

ett L. Keith, absolutely disinterested, says:

(T. 91.)

"Q. Can you state what happened?

A. Yes. He drove in there in his car and asked me if I would go over and change a tire for him, and he said the car had—he had jacked it up and it had fell off onto him and hurt his back and he wanted to know if I would go over there, and he seemed to be in pain there, and his face was white and everything, so I told him sure, I would go over and change the tire, so I went over there and the car was right just as he had left it there, the jack was still laying underneath the car, and I jacked the car up——" (T. 92 to 93.)

"A. Well, he seemed to be hurt all right, he seemed to be in pain. I know he couldn't hardly get out from underneath the wheel to let me drive it over there. I drove the car back over to where the tire was at that he wanted changed.

Q. What was his condition that made you think he was in pain?

A. Why, he was nervous and his face was white. I didn't want to go, either, because it was cold and rainy."

(T. 98.)

"A. When we drove in there they wanted to

know what was the matter and he told him the car had fell off the jack and hurt his back, so they sent him on home then.

Q. What stated that?

A. Mr. Hunt.

Q. In your presence?

A. Yes.

Q. To whom did he state it?

A. Mr. Timmer.

Q. Mr. Timmer?

A. Yes.

Q. And what was Mr. Timmer's position there?

A. Manager."

There seemed to be a feeling upon Defendant's part that the insurance company was not liable to pay for the accident of November 5, 1934, and it caused Mr. Russell to telephone and interview Mr. Hadfield, the adjuster, and attempt to convince him that the injury was a recurrence of the injury of June 11, 1934. (T. 133.) Perhaps that is the reason Mr. Russell kept Plaintiff on full time payment (T. 70, 71, 109, 111, 129 and 67).

By its manager and its surgeon it represented to the insurance company that Plaintiff's injury was a recurrence of the injury of June 11, 1934, while policy 519380 with the Union Service Stations, Inc., was in force. (T. 133 and 142.) To this Plaintiff, it represented (T. 129 and 67) as to this Court upon this appeal it represents (T. 106, line 8; Def.'s Brief, p. 7) that it accepted his statement that the injury sued upon was the result of the accident of November 5, 1934.

With such duplicity in the mind and conduct of the Defendant, how can it now be heard to say that it understood that it was reaching an accord and satisfaction with Plaintiff for all of his damage for the accident of November 5, 1934?

From Defendant's own testimony and exhibits (T. 152, 153 and 154), Hartford Accident & Indemnity Company paid $787.46 for doctors' and hospital bills and time lost on account of the accident of June 11, 1934, under policy No. U S 519380 (D. Ex. 26), in which Union Service Stations, Inc., was the assured and at that time Plaintiff's employer, on account of which policy Defendant was entitled to no credit, to which it was not a party and for which accident it was in no way liable;—yet, behold, it represented to Plaintiff as it now represents to the Court, that with

the trifle of $33.60 paid under the unknown, unproven policy No. 543012 (D. Ex. 10, T. 152), it should be credited in full or at least to have added the $787.46 paid for Union Service Stations, Inc., above, and be credited for $820.80 on account of all of Plaintiff's general damage for suffering, pain, permanent disability and impairment, etc., on account of the accident of four months later or November 5, 1934.

According to Defendant's witness, its own insurance adjuster, Mr. Hadfield (T. 142), this $33.60 (D. Ex. 10, T. 152) also should have been paid under Union Service Stations, Inc., policy U S 519380 as time lost because of the "recurrence of the injury of June 11, 1934." Dr. Dillehunt, the great surgeon, must speak accurately, and Webster's New International Dictionary, 1925 edition, page 1786, shows "recur" to mean: "To occur or appear again, * * * as, the fever will recur tonight." Mr. Hadfield's testimony must be an admission by Defendant that the entrie payment of $820.30 was Plaintiff's own credit due under above policy U S 519380 as justly as if deposited in a bank as his special damages because of the accident he had suffered June 11, 1934.

Permitting the violent assumption for which there

is no evidence, that had policy No. 543012 been introduced and that among its unknown terms it had provided that this paltry $33.60 (D. Ex. 10),—the only sum which from all evidence appears to have been paid on account of the Defendant—should be for a general and complete release from Plaintiff for all his general injuries and damages, resulting from the accident of November 5, 1934 [besides Mr. Hadfield's statement that it was in error and should have been for the recurrence of the injury of June 11, 1934 (T. 142)], such an assumption would stand as a naked example of what is shockingly unconscionable.

Such is the duplicity, the contradictions of its own testimony and admissions and written evidence with which it seeks to prove an accord and satisfaction entered into at a time when neither party knew what the nature and extent of the injuries were to prove to be (T. 133 and 110 to 111); but which injuries developed to be most serious and extensive, including pain (T. 61 to 66) and suffering, including mental anguish (T. 67 to 72), hardship (T. 80), permanent impairment of his body and earning power and continuing and future pain and handicap (T. 80). Against these unbelievable improbabilities stands the strong, consistent repeated testimony of Plaintiff's understanding,

which is uncontroverted and unweakened (T. 113 to 114).

(T. 143.)

"Q. Now, at any time, whether by the singing of the check or in any manner, did you ever agree with any person to waive your right to claim for injuries to yourself your body, your person, on account of the accident of November 5th?

A. No, I didn't."

(T. 143 to 144.)

"Q. I wish to hand you Defendant's Exhibit 27, that is the insurance policy which Mr. Hadfield stated was the second insurance policy and which was introduced last. I will ask you when you first saw that policy.

A. Yesterday was the first time I saw it.

Q. When it was brought in here?

A. When it was brought in here.

Q. Did you ever discuss that policy with anyone?

A. No, sir.

Q. Did you ever agree to accept anything under that policy in consideration of the settlement

of your claims against the Union Oil Company?

A. No, sir."

(T. 145 to 146.)

"Mr. Rauch: Q. When you received those checks marked for the accident of November 5th, 1934, what did you understand you were receiving?

A. I understood I was receiving my time for the accident that happened to me. It was just payment or compensation for time lost.

Q. Lost on account of what?

A. Well, the first injury, and I saw the dates on there and I thought possibly there was a mistake, to the second accident and the aggravation of the first injury.

Q. Did you ever accept any money at any time from this defendant or its insurance company for any other claim than this compensation, for any other claim or for any other reason or thing than for this compensation which you state is for time lost due to the operation, the first accident, aggravation of that, and the second accident?

A. No, sir."

All of the evidence offered, written and parol, was given the jury to determine whether, as a matter of

fact, the payments made to or for Plaintiff were considered and understood by him as made in complete release and discharge of all obligations and liability growing out of the accident of November 5, 1934, or whether he understood he was just being paid for the loss of his time.

Plaintiff's testimony was at all times consistent and positive that he understood that the money he received was solely for time lost (T. 145 to 146), and that no agreement or understanding of accord, satisfaction or release was ever made or entered by him with anyone on account of injuries to his body or person because of the accident of November 5, 1934 (T. 143, 144 and 146.)

There was complete disagreement between Plaintiff and Defendant at all times, including throughout the trial, as to which accident caused the injuries, Plaintiff at all times insisting and telling Defendant that they were caused by a car falling on him November 5, 1934 (T. 67, 125 and 129), and Defendant at all times insisting that Plaintiff informed it that the injury was a recurrence of June 11, 1934 (T. 132 and 133), and that in truth it was such recurrence (T. 142 and 163), and after making one draft for time lost on account of the accident as Plaintiff declared it

happened (D. Ex. 10), changed back to its claim of recurrence (D. Ex. 11) and made all subsequent drafts consistent with its claim; and only now upon this Appeal does it admit that Plaintiff was right all the time (T. 106; Appellant's Brief, pp. 5 and 7.)

There was no evidence that Plaintiff understood that he was receipting for anything more or different when he accepted compensation for lost time after he went to the hospital than he did before, when he was receiving full time pay for complete absence from the office or just to "fuss around" (T. 69, 70, 109 and 111) from the time of the accident of June 11, 1934 (T. 109).

At the time of the interview, neither party knew what the extent and permanence of the injuries would be, as neither knew what a fusion operation was (T. 110, 111 and 133).

That the injuries were grave, extensive, permanent and actual is not in the least disputed, including pain and injury (T. 61 and 66), suffering and confinement (T. 67 to 72), mental anguish and physical suffering at the hospital (T. 73 to 79), the hardship of convalescence (T. 80), and permanent handicap, impairment and pain (T. 81 to 85); nor does Defendant

attempt to justify its shockingly unconscionable claim that for complete satisfaction and compensation for such grave general injuries, Plaintiff understood he was accepting $33.60. Yet that is all that was ever paid, even by mistake for the injuries sued for herein, arising from the accident of November 5, 1934. True, it now claims credit for $787.46 which the insurance company paid for the accident of June 11, 1934, but that was upon policy U S 519380 (T. 154, D. Ex. 26) written for the Union Service Stations, Inc., which at that time was Plaintiff's employer and in which policy and payment, Defendant had no interest.

The written evidence fails wholly to include any general release executed by Plaintiff. All of the payments except one were made under the policy to Union Service Stations, Inc., U. S. 519380 (D. Ex. 26) for an entirely different accident than the one sued upon. The one payment made on account of the accident sued upon on November 5, 1934, was so made by mistake of the insurance company (T. 142).

This one payment so erroneously made was on account of a policy (No. 543012) never proven or explained (T. 151). What were its terms, Defendant at no time gave any evidence or inference, though it was

repeatedly brought to its attention at the trial (T. 136, 138, 144 and 145).

No policy was introduced under the terms of which anything was paid this Plaintiff on account of the accident complained of on November 5, 1934. True, Defendant put in its (Ex. 27) or policy No. 543014, but nothing was ever paid or done under it. This immaterial exhibit and (D. Ex. 26) contain a clause requiring a general release when a first payment is made an employee thereunder. A sample of general release designed by the same insurance company that wrote (D. Exs. 26 and 27) is set forth in *Anderson v. Hartford Accident & Indemnity Company*, cited herein by appellant; yet no general release of any kind was introduced in this case.

Each draft upon which Plaintiff signed a receipt definitely showed in detail the claim for which its endorser receipted, and each specified a distinct and separate period of the time or segment, the claim for the loss of which, such draft was to compensate; and thereby, each negatived any pretense that it was payment or settlement for anything else.

Therefore, from all the evidence in this case, written and parol, the jury was justified in finding that the Appellant failed to show that anything was paid

by it to Plaintiff or was considered by him to have been paid by it as in release or discharge of the obligation Appellant owed Plaintiff because of his general damages and injuries to his person, growing out of the accident of November 5, 1934. Also, the jury was justified in finding from all the evidence that Plaintiff understood that the money which was paid him was for the loss of his time, only. The facts also justified the jury in finding that the money paid Plaintiff was for loss of time, growing out of another accident of June 11, 1934, while he was working for an employer other than Defendant.

All of the evidence being before the jury, it must be presumed in arriving at its verdict to have taken into consideration for what they were worth, immaterial though they may be because paid for another accident of June 11, 1934, all the payments for hospital bills, doctors' bills and time lost. At least no one claims the verdict was excessive.

SPECIFICATION OF ERROR NO. 1

By this Specification, Defendant seeks the protection of the defense of assumption of risk.

Of course, as pointed out herein at pages 33 to 34 hereof, Defendant deprived itself of this defense when

it rejected the Workmen's Compensation Act (T. 8 Par. VII and T. 10 Par. II) 1935 Sup. Ore. Code, Sec. 49-1819, Holopeter v. Palm; 134 Or. 546 see page 564.

This Plaintiff seeks the fullest benefit of this statute against the attempts of Defendant to protect itself by such defense. However, without in the least waiving any portion of such benefit due Plaintiff, our respect for the high authorities quoted lead us to endeavor, by way of courtesy to the elaborate specifications of error in Defendant's Brief, to discuss some of them as concisely as possible.

The law is so well established and so often well stated in this Court and in Oregon that Defendant's conclusion that the Plaintiff assumed the risk must result from a different understanding of the facts from ours.

On pages 14 and 15 Defendant seems to imply that Plaintiff should have taken the heavy station jack with him. No witness of either party suggested that it was ever used on repair jobs away from the station. The Plaintiff said:

(T. 53 to 54)

"Q. On the station lot there was a large, heavy

jack there of the type that rolls on four wheels that you could pull around with a large extension handle on it, and this jack was too heavy, I couldn't have lifted it, taken it out on the call; and if I got—if someone could have put it in I could never have gotten it out of my car. Also this jack, we didn't use it whenever possible because it had a habit of slipping, and when you get the car up you couldn't always get it down. You have to shake and jiggle the handle to get that jack to lower, and so I went on to this job without my own jack."

This station jack was broken and unsafe. Disinterested Witness Ernest H. Coats testified:

(T. 87 and 88)

"Q. Now, that was between the dates of June, 1934, and November, 1934?

A. Yes, as close as I can figure it.

Q. Now I want to ask you if during that period of time you knew whether or not there was a jack at the station?

A. There was, yes.

Q. And can you state whether or not it was this jack?

A. It couldn't have been—it might have been this jack, but there is new parts on it, sir.

Q. Well, what was the difference, if any, with the jack as it was at that time and this one as you see it?

A. May I show you?

Q. Yes, step down and look at it.

A. Well, the jack that was over there at that time, on these little——

Q. Push it out this way so the jury may all see it.

A. There was ends knocked off of about two, if I remember right, of these little rachets right here, the ends of them, and when it come down to those, why you would have quite a jump in that handle when you would come down on those and it would drop down to maybe the third one here, and when it did it would jerk this handle and it would be very unpleasant as to handling it, and for that reason we stayed away from it as much as possible. We didn't use this as much as we could because there was two of these ends knocked off.

Q. Did you ever have any further dealings at Fargo and Union other than this intermittent dealing while you were at Station 425 at 13th and Broadway.

A. Well, I was manager of it during the fall of '35 until it was leased out.

Q. As manager did you have anything to do with that defective jack that you described?

A. Why, yes. At that time Mr. McGrath was assisting Mr. Russell, or whoever the supervisor was then, and when I was made manager of it I immediately—I was a friend of Mr. McGrath's and I immediately called him and asked him to get me a jack that was—that I could use, one that would be safe, so it wasn't very long before he came over with a jack on the side of a running board of a car with the handle of it thrown over the fender, and he dropped that jack off to me. He gave me that jack, and took the one that was there away, and that is the last I have seen of it."

The Plaintiff further testified:

(T. 103)

"A. Well, the jack that was at the station at that time, the teeth and the rachet effect on one end of the teeth was sheared off, and the spring handle, when you would work the spring handle it would stick. I don't know how this one works. The other one wouldn't release properly. You would squeeze that and it wouldn't give. You would have to shake the jack to get it to release.

Q. What was the effect on one using it?

A. Well, when you shook that thing it jarred

you and all at once it let go and this handle would fly up and you would have to hang on to lower it down."

Surely no rule of law compelled Plaintiff to attempt something he was not strong enough to do. Defendant knew his condition, and was apparently keeping him on so as not to report a loss time accident (T. 70) until it could be adjusted as a charge against the insurance of Union Service Stations, Inc., and not increase Defendant's record of accident (T. 142) which it eventually accomplished.

There is no claim that Plaintiff knew his own jack was dangerous or to dispute his following testimony. (T. 42)

"Q. Now, your own jack, was there anything wrong with it especially?

A. No, it had been working right along.

Q. And it was all right for your car, was it?

A. It worked on my car.

Q. What was wrong with it for this car?

A. There apparently wasn't anything, there shouldn't have been anything wrong with it for this car.

Q. Well, was there anything wrong with it for this car?

A. Well, when I used it and got the car jacked up the car slipped off the jack."

Defendant would seem to limit the difference between the weak, old type Ford jack to the "shortness of the jack handle" (Def's. Brief page 16).

Disinterested Everett L. Keith seemed to have a better knowledge of the mechanics involved in the use of the two jacks with the particular type of car involved.

(T. 95, 96 and 97)

"A. They have quite an overhang on the Plymouths. They are built rather low to the ground, and this one had a trunk rack on the back of it.

Q. It had a trunk rack in back?

A. Yes, sir.

Q. Can you state what the structure of the car is as far as distance from the axle to the rear of it is concerned?

A. You mean to state the distance from the axle to the back of the car?

Q. Yes.

A. Oh, approximately four feet.

Q. Approximately four feet. Well now, what did you do when you got there?

A. Well, I took off my raincoat and laid it on

the ground and crawled underneath there and jacked it up again with the same jack.

Q. Will you state why you crawled under it?

A. Because you couldn't walk under it.

Q. Well, why did you go under it?

A. To jack up the car.

Q. To jack the car up. Could you jack it up from outside any way other than to crawl under it?

A. Not with that jack, no. If the jack for the car had been there like it is supposed to be used on that car you could have jacked it up from the outside, but there was no other jack there.

Q. What kind of jacks were supposed to be used on that car?

A. It is supposed to be a screw type jack that you could insert a handle in and push it back underneath there and stand on the outside and wind the car up without crawling underneath it.

Q. Do you know what form of jack was used generally in the community at that time with that type of car?

A. A screw type jack.

Q. Screw type jack. Well now, will you describe to the jury the difference between the

screw type jack and the actual jack which was used to raise that car?

A. The Ford jack that they had there, you had a handle approximately so long that you would push down this handle and every time it would go down you would raise it a notch. With a screw type jack for that car it is supposed to be a screw so that you could push a handle into the jack and slide the jack under the car and stand back from under the car and turn the crank and raise your car up.

Q. Now, can you state which was the higher jack?

A. State which?

Q. Which was the tallest jack, standing on the ground?

A. The Ford jack that he had.

Q. What was the difference in their height, can you show?

A. Oh, a Ford jack is approximately that tall and these little jacks that are supposed to come with the car are only about that tall (indicating).

Q. Do you know whether or not there was any provision on the screw type jack to keep it from slipping from under a car?

A. Yes. On top of the screw type jack there

is four little prongs there that catch the axle to keep it from slipping off.

Q. Was there any such thing as that on the top of the Ford jack?

A. No."

and at (T. 99)

"A. The type of jack that was used on the car there was for a Ford where you could jack up a Ford without getting underneath the car, but with this particular car you should have had a jack with a handle on it about four feet long to raise it without getting under the car."

also (T. 101 to 102)

"Mr. Rauch: Q. Then will you state whether a simple longer handle was required to make a safe tool or an entirely different jack?

(An objection was here interposed; objection overruled.)

A. What I should have had is a telescope jack with a screw type action on it. You should have had an extension handle that extended on beyond the end of the car and that fitted into this jack, and you could have screwed the jack up. You could have stood out at the rear end of the car and turned the jack and raised the car up."

Defendant infers negligence because Plaintiff didn't

prove "the brake was set" (Def's. Brief 16); but the testimony of Witness Keith on that point is:

(T. 93 and 94)

"A. It was parked on the wrong side of the street with the wheels, front wheels, cramped in towards the curb.

Q. Is that street level or does it slope there?

A. No, it slopes to the west.

Q. And which way was the car facing?

A. Towards the west.

Q. And with the front which way?

A. West.

Q. And what part of that car was against the curb, if any?

A. The left front wheel.

Q. The left front wheel. And can you state whether or not the car was in a position that it could move itself?

A. No, it couldn't because the curb stopped it from rolling ahead, and it couldn't roll back uphill.

Q. It was uphill, back?

A. Back, yes.

Q. And the curb was in front of it?

A. Yes."

Defendant (Def's. Brief 17) charges that Plaintiff was "acting of his own accord; no one in the company asked him to", but must we overlook the sales pressure under the quota system that drove these service salesmen?

(T. 50)

"Q. And was there anything to keep you from calling that other station and have someone over there or call some station where they had some extra men if you wanted a man to go down there and get it changed?

A. Well, there were several reasons why we didn't do that. We want the business in our station; this was our customer. At that time there was a quota system on the work that we did, and all service work counted in this system and we naturally wanted the work for ourselves."

and (T. 51)

"Q. Well, the reason you didn't call up anybody else was because of that quota system, you wanted that business yourself?

A. That is right. He was our customer and we wanted to take care of him ourselves. You re-

member he was pretty close to that station and if they had serviced his car we'd have probably lost the customer.

Q. And you would have lost something by that, wouldn't you?

A. We would have lost his business.

Q. Yes, but I mean you had some quota system there you were working on?

A. That is right."

The learned trial judge pointed this out to Defendant at (T. 31).

"Here is a case where station employees were encouraged, under sales pressure, to go off the employer's premises to render services."

Defendant (Def's. Brief 17) would have it believed that an able-bodied assistant could have done nothing but take the blow for Plaintiff, yet it in no way challenges or refutes the following testimony:

(T. 102)

"Mr. Rauch: Q. Now, I want to ask you why it was you didn't take the big jack out?

A. Well, the big jack was too heavy. It required two men to lift that jack.

(An objection was here interposed; objection sustained.)

Mr. Rauch: Q. All right, I will ask this; something was said about an able bodied assistant. State whether or not if you had had one you could have taken the large jack.

A. Yes, I could have.

(An objection was here interposed; objection overruled.)

A. If I had had an assistant he could have lifted the jack in and out of the car."

Defendant (Def's. Brief 22) disagrees sharply with the learned District Court herein concerning the Oregon Supreme Court's relaxing attitude toward the stringent rules in regard to assumption of risk as promulgated in England during the stage coach days of 1837.

With regard to this present day view, the Oregon Court has long since spoken for itself.

In Shields v. W. R. Grace & Co., 179 Pac. 265, 91 Or. 187 at page 204 Chief Justice McBride in an often quoted expression said:

"While, theoretically, a laborer is a free agent, at liberty to examine and guard against danger occurring, or liable to occur, in the course of his employment, and to demand requisite protection, or quit the employment or take the consequences

of remaining, it is common knowledge that such a theory is to a great extent impracticable in the present busy crowded age. His freedom to select his employment is abridged by the constantly increasing numbers who must work or go hungry, and his risks are increased by the immense pressure of a tremendous commerce and the complicated methods of handling it. Under the pressure of competition for employment and the necessity of maintaining his place as a satisfactory laborer, he has little time for observing his surroundings, or taking or even demanding of his employer, those precautions for his safety which a human regard for his welfare ought to be furnished without demand.

These and like considerations have, no doubt, had their influence with the most enlightened and progressive jurists, in declaring much less stringent rules in regard to assumption of risk, than prevailed in the earlier history of jurisprudence where competition in labor was less strenuous and the duty of protecting the laborer was less clearly recognized by the courts."

In Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18 at page 33 in a case where there had been a complaint and promise to repair a shovel Mr. Justice Belt expresses further the Oregon view:

"This court is not unmindful of the fact that

the ordinary laborer who must work in order to eat would, under such circumstances, obey the command of the foreman. The work was not so obviously dangerous as to cause an ordinarily prudent man to refuse to go on with it. Ordinarily, assumption of risk is a question of fact for the jury. To hold, as a matter of law, that plaintiff voluntarily assumed the risk is, in our opinion, giving undue emphasis to the doctrine, although some courts apparently take cognizance of only physical coercion.

The trend of modern decisions is to rebel against the harshness of a doctrine which enables the master to say, in effect, to the servant: 'It is true, as you have complained, that I have been negligent in failing in furnish you with a reasonably safe tool, but you are nevertheless ordered to continue work and, in the event you are injured, there can be no recovery since you understood and appreciated the risk of working with such defective appliance.' "

In the more recent case of Makino v. Spokane, Portland & Seattle Railway Co., 63 P. (2d) 1082, 155 Or. 317 at page 336 Mr. Justice Rossman, quoting in full Chief Justice McBride's statement above, remarks:

"Justice McBride's excellent dissertation on the shortcomings of the rule of assumption of risk as formerly applied was entirely appro-

The following expression by Mr. Chief Justice McBride in the case of *Putnam v. Pacific Monthly Co.*, 68 Or. 36, 130 P. 986, 136 P. 835, escaped the printer through oversight, and we now beg to include it by insertion. This distinguished jurist made the following expression upon a rehearing, and it is found on page 57 of the Oregon report:

> "In the early history of jurisprudence a suit for damages by a servant against his master, while it was tolerated, was always looked upon with disfavor by the courts as a sort of moral petit treason, and every limitation that judicial ingenuity could devise was interposed to make recovery difficult; but in the progress of the years this strictness has greatly relaxed, and the doctrine of the assumption of risk and negligence of fellow-servant has been placed upon a decent and logical basis."

priate in his decision. It was a part of his analysis of the rule and indicated the manner in which the decision had been reached."

The law in Oregon is well settled as stated by Judge Belt in Bevin v. O.-W. R. & N. Co. ante at page 27:

> "It is well settled that an employee assumes the ordinary risks incident to his employment and also those extraordinary risks arising through the negligence of the employer if he understands and appreciates them."

Judge Bean in Christie v. Great Northern Railway Co., 20 P. (2d) 377, 142 Or. 321 page 331 repeats the same words as the rule in Oregon and cites Bevin v. O.-W. R. & N. Co. ante for authority. The same words are again quoted verbatim by Judge Rossman in Makino v. S., P. & S. Ry Co., 155 Or. 317 ante at page 329.

Defendant cites Northwestern Pac. R. Co. v. Fiedler, 52 F. (2d) 400, and the learned District Judge followed the rule so clearly stated by the Hon. William H. Sawtelle of this Circuit at page 403:

> "As to assumption of risk, the Supreme Court has laid down the following rule: 'The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show

> it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury.' "

It also cites Freeman v. Wentworth & Irwin, Inc. 7 P. (2d) 796, 139 Or. 1 with great satisfaction in its conclusions and rules, but a glance at the facts shows how widely they differ from the case at bar; the court states at page 9:

> "It seems evident that it was not the absence of light, but the plaintiff's failure to properly clean the end of the shaft which caused the accident.",

and at pages 9 and 10:

> "The plaintiff swore that during his six years' employment by the defendant it had never furnished him with a hammer made of copper although, according to his testimony, he had asked it to do so." * * * * "but we didn't have any copper or brass over there, so in order to safeguard on that sort of bludgeon work, as we call it, we usually got a piece of oak, hard wood." He testified that the body-building department of the defendant's plant supplied him with pieces of hard wood upon request, but he did not account for his failure to use a piece of hard wood at the time of the accident."

at page 11:

> "We know of no reason whatever why a short steel bar could not have been tapped into position by the use of a piece of oak; especially, do we know of no reason why this could not have been done by a workman who customarily used that method."

And the decision followed the rule of Bevin v. O.-W. R & N. Co., quoted above, and concluded at page 13:

> "It is apparent that the plaintiff had full knowledge of and appreciated the danger to himself."

The remaining cases which Defendant has cited under this heading involve only the "ordinary risks incident to his employment" of each plaintiff respectively:

Parker v. Norton, 143 Or. 165, (21 P. (2d) 790)

A longshoreman's hook held in the hand to aid one to pile boxes of tin on a dock.

Wike v. O.-W. R. & No. Co., 83 Or. 678 (163 P. 825)

A wire to wrap around an engine boiler by hand in a railroad repair shop.

Walker v. Ginsburg, 244 Mich., 568; (222 N. W. 192)

A wrecking bar held in the hands to pry off boards in the process of wrecking a mill.

Thompson v. Pennsylvania Railroad Company, 88 F. (2d) 148

A steel bar held in the hands as a lever inserted into a bearing hole of a locomotive drive rod, to turn it in an engine repair shop.

In the within case you have an "extraordinary risk arising through the negligence of the employer" which Plaintiff, the employee, by uncontroverted testimony and all logical deduction, did not "understand or appreciate."

Defendant operated a service and sales station which included repairing automobile tires within and without its station. In the regular scope and policy of its business it required Plaintiff to (T. 41): "maybe four tires a week, to go out to service on a customer's yard or out on the street in front of the station or down the street from the station, whenever the call happened to come in," under a sales pressure or "quota system" under which Plaintiff's standing with Defendant and his compensation were measured (T. 50, 51 & 113). A call came (T. 41 Narrative State-

ment) to change a flat tire some distance from the station where Plaintiff worked while he was alone, and it was his duty to himself and his station (T. 51) to respond.

At the service station was a heavy four wheeled jack that was pulled around with a large extension handle, but it was broken and unsafe to use (T. 54) as Witness Ernest H. Coats states (T. 87 and 88) and Plaintiff said (T. 102), was too heavy to lift in and out of the car (T. 103), had teeth sheared off the ratchet mechanism that would cause its load to drop past several teeth with a jar that jerked the handle up and was avoided by the men because its use was unpleasant and dangerous (T. 88 and 54). Obviously it was strictly a station jack, not intended for outside use and there was no evidence that it ever was so used.

The customer had a 1930 Plymouth sedan (T. 54 and 56). He was drunk (T.42) and no help to plaintiff (T. 43), and his jack for the car was broken. Defendant furnished no jack for such outside-the-station work (T. 48 and 53). Plaintiff had to use his own frail Ford jack which was regular equipment that came in a Model "A" Ford, practically a Model "T" Ford jack (T. 54, 42 and 46). Plaintiff met a new and extraordinary situation, under cross-examination he said:

(T. 47)

"Q. So you met a new situation when you got down where the car was that you didn't anticipate back at the station?

A. That is right."

The Plymouth sedans of 1930 were built with their rear quite low with a trunk rack and trunk (T. 54), the axle about ten inches above the ground when the tire was deflated, and allowed between six and eight inches at its rear for Plaintiff to crawl under.

The situation was not ordinary, and Plaintiff's problem became complicated and the Ford jack under the circumstances a very complicated instrument. It was designed to lift the comparatively light Ford Model "A" cars. It is common knoweldge that they were of high clearance, short wheel base, tops largely of cloth and doors of tin with small high pressure tires, and fenders high above the ground leaving the wheels, axles and spring easily reached so that a jack could be easily placed to raise such a Ford and operated in changing a tire easily from the side with the operation free from danger. (T. 100)

The Plymouth sedans of 1930, it is also common knoweldge, were much longer, lower and heavier, their bodies largely of steel and with fenders low to

the ground and covering the wheels and large low pressure tires. You couldn't reach around the wheel to jack such a car up with the Ford jack; Plaintiff testified:

(T. 104)

"Q. Anyone would have had to crawl under it, is that correct?

A. That is right, they'd have had to crawl under it."

The jacks furnished by the manufacturers of these types of cars were as different as the cars. The Ford jack was a frail instrument, with a flat top or platform (T. 45 and 56), not "a prong tip jack to clamp around that axle and hold it on" (T. 45), also Witness Keith at (T. 97) with a short handle and of the ratchet type that went up a notch at a time (T. 45, 54 and 56), and to use on a Plymouth 1930 car, required the operator to crawl under the car (T. 104).

The jack provided for the Plymouth 1930 was a screw type, working like a telescope, one section after another rising until the desired height was reached. The screws forming the telescope were driven by another screw or worm into which an extension handle fitted by which the jack could be slid under the car, and then the worm turned or cranked raising the car

while the operator stood back from under the car and cranked or twisted the handle. Upon the screw type, instead of the flat, smooth top or platform, were prongs that fit or clamped around the axle to hold it on and prevent the car from slipping off the jack (T. 55, 56, 102, 96 and 97).

Plaintiff had no knowledge that the Ford jack was dangerous or unfitted.

(T. 99)

"A. The little jack I used was not all right. As far as I knew it was all right, I had been using it on other cars and it worked right along, yes.

Q. It worked all right for cars of the age and vintage that it was made?

A. Yes, it was."

also (T. 48). He was merely a service boy, twenty years old, who previously had been a newsboy, painter's and baker's helper, his own car was the Model "A" Ford, with which the jack he used came as equipment and with which car he used it (T. 99 and 100). There is nothing to show that he had any knowledge or training with which to meet emergencies out away from the station. He looked on life from the standpoint of a "flivver" driver, and he met his emergencies with

a "flivver" equipment, and says he knew no better, and there is no contradiction of his word (T. 42, 44, 48 and 49). He never knew to the day of trial how or why the car fell (T. 44 and 59).

Defendant at (Page 30 of its Brief) would blame Plaintiff for not blocking the wheels, yet at (T. 93 and 94) Witness Keith states how the car was completely blocked by the curb from moving forward and by the up grade of the hill from moving backward. There is no proof that the brakes were not set. Nothing else is suggested by Defendant or apparent to have made the operation safe except for Defendant to have furnished its employee with an instrument which would have made it unnecessary for Plaintiff to crawl under the car.

It may have been that the resilience of the tires caused a sway or vibration while the Ford jack with the flat top was being applied so that its contact with car was unstable. Plaintiff says (T. 44, 58 and 59) that when he raised himself or elevated his hips to get out, that the car fell. He may have so moved the car, already unstable, on the Ford jack enough to make it fall. Whatever the cause, no man of ordinary knowledge knows now, much less could have "under-

stood or appreciated" the risk which was extraordinary.

It was an engineering problem. The expert engineers of the makers of the new type cars, with the benefit of the experience of the entire public available to them, knew the danger. They designed and provided a jack with a prong or clamp top that would not slip, and so built and equipped that the user need not get under the car. The engineers, managers and other officials of Defendant who designed and developed fuel and lubricants for these new cars knew or should have known the danger.

There is no denial that it was the custom and duty of Defendant to furnish the necessary tools for its employees (D. Ex. 2, 3, 4 and 5 and Supplemental Transcript 1). The screw type jacks were "general", "quite common" (T. 55), "used generally in the community" (T. 96). "They came with cars that had the trunks, the longer rear ends" * * * "you could have bought those jacks on the market. They were for sale" (T. 46). They were not the latest, most expensive equipment. As Defendant expresses it, there must have been millions in use. Yet it furnished only one jack, too heavy and clumsy to use except about the station, and it in bad repair and dangerous, and no portable jack at all to take out on service jobs outside

the station where it sent its employees to service its customers under the sales pressure of its quota system. And now they argue that it was an ordinary risk for Plaintiff to use his immature, untrained judgment in selecting, furnishing and using a device which became most complicated and passed far beyond his physical power to control as its operation multiplied the strength of his body and set into action forces of which he had no understanding; and which device was further complicated and complexed by its application to a modern automobile creating and setting up risks which he wholly failed to appreciate because he was entirely ignorant of such risks and dangers, especially since he had exposed himself to them before with the good fortune not to have them result in disaster to him.

DEFENDANT'S POINT ENTITLED—EMPLOYEE CREATING OWN WORKING CONDITIONS

(Def. Brief, page 30.)

Plaintiff had no chance to create any conditions, least of all "his own". Under the sales pressure of the quota system, he had to service the Defendant's customer where and when that customer ordered. Why time is taken for this statement is hard to see. Defend-

ant argues that Plaintiff undertook the work (a) unknown to Defendant, (b) should have moved car to some other place, (c) should have blocked the wheels. Record (T. 41) shows call came in regular way (a) known and under sales pressure policy (b) from customer who wanted tire changed because he was drunk (T. 42) at his residence, who, had he wanted his tube chewed up by moving the car with the tire flat, would not have ordered Defendant to come and change it. What service moving it would have been! (c) That the car was most effectively blocked is shown by Witness Keith at (T. 93 and 94).

Defendant's authorities do not apply.

> Phillips v. Keltner's Adm'r., 124 S. W. (2d) 71, 276 Ky. 254.

Plaintiff dug trap for himself and sat in it while rock pile slid down upon him after he had been repeatedly warned. Simple tools, shovel and wheelbarrow, were furnished by employer.

In our present case, as already shown, Defendant furnished no simple tool but wholly neglected to furnish any tool and forced Plaintiff to select one which under the circumstances and combinations of fact became most highly and dangerously complicated, thus eliminating any simple tool question.

City of Timpson v. Powers, 119 S. W. (2d) 145 Tex.

Court held the plaintiff there not engaged in repair work and as farm laborer placing poles, it was a question for jury to determine whether he assumed risk of electric shock.

Dinuhn v. Western N. Y. Water Co., 297 N. Y. S. 376; 252 App. Div. 51.

Here the Plaintiff was engaged in a repair of the Defendant's building and was injured by slippery floor caused by mud tracked in by workmen while new stairs were placed with the Plaintiff's help.

Even had Plaintiff created his own working conditions, the defense of assumption of risk was denied Defendant as previously pointed out because it had rejected the Workmen's Compensation Act.

HIS OWN TOOLS

(Def's. Brief page 31)

Besides being denied this defense for having rejected the Compensation Law, the facts of the present case do not admit of such a defense nor in any way

coincide with the authorities cited. Defendant's duty was to furnish all tools for its employees, and it did except a portable jack. It furnished a heavy, defective and dangerous jack for about-the-station use. It left Plaintiff to meet emergencies and extraordinary risks away from the station with his own frail, inadequate device which his immature ignorance led him to use where so unfitted as to create a situation of extreme hazard to him.

The employers in the first two cases Defendant cites under this heading, contracted with the workmen to bring their own tools onto the job, and it was their duty to furnish them. In the third case cited the employer furnished safe and sufficient ladders, but one fellow servant discarded his employer's ladder and supplied a dangerous one to the plaintiff. In all three of these cases, the negligence of a fellow servant was present.

COMPARATIVE KNOWLEDGE

(Def's. Brief page 33)

This is stating a phase of the assumption of risk

defense which of course is denied Defendant for rejecting the Compensation Law.

The cases cited under this head come under that portion of the rule in Oregon referred to so often herein, and as stated by Judge Belt in *Bevin v. O.-W. R. & N. Co.*, 136 Or. 1, at 26: "An employee assumes the ordinary risks incident to his employment." The risks and danger to Plaintiff resulting to his injury in this case were "extraordinary risks arising through the negligence of the employer" of which Plaintiff was wholly ignorant and could not "understand and appreciate".

WORK BEYOND HIS PHYSICAL CAPACITIES

(Def's. Brief page 36)

Plaintiff testified (T. 104) that his back had nothing to do with the obvious necessity of crawling under the Plymouth to raise it with the Ford jack. Anyone would have had to crawl under it. Likewise, testified Witness Keith (T. 95). So under the facts in this case, the argument under this head would have no bearing in this case, even had Defendant not deprived itself of such defense by rejection of the statute.

SPECIFICATION OF ERROR NO. II

(Def's. Brief page 38)

This specification would greatly concern the Ford jack as a simple tool if it were not in fact so complicated. It was composed of many parts, some of them very small and concealed. The very length of its handle, the construction, form and surface of its platform, the mechanism of its lifting power that made it go up a notch at a time (T. 56) or how "every time it would go down you would raise it a notch", were all shown to be complications. The service boys who used it showed by their testimony how much beyond their knowledge its mysteries were except that "It worked on the ratchet type" (T. 54). Some of its ratchets or other parts might easily have been worn or broken, and for all they or anyone knew slipped or let go and caused the car to fall.

When applied to the cars that came out in 1929 and 1930, which these boys had to serve, the Ford jack's complex structure and complication grow in comprehension. What strains and resistance were set up in such cars and their parts, such as tires and

springs when such jack was applied? Just why these new types of cars required jacks of the positive screw mechanism instead of the less certain and less smoothly operating ratchet movement, prongs on top to clamp around their axles and construction to keep people from under them, presented problems and suggested risks Plaintiff and the other service boys did not understand or appreciate. They could not be expected to do so, but it surely was the business of Defendant through its engineers, technical men and managers to know. It was in the business of manufacturing, selling and servicing for these cars, fuels, lubricants, tires and supplies. These types of cars had been out four or five years. Defendant should have known.

Defendant encouraged its service boys to go out and meet emergencies of service like the one resulting in the accident of this case.

The manufacturers of these cars knew these questions, and had answeared them with the screw type jack.

What little care would Defendant have needed to exercise to have provided its service boys with this screw device to meet these extraordinary risks of outside emergency service?

We submit that the Learned Trial Judge did not err in leaving to the jury the question to determine from the preponderance of the evidence whether Defendant provided reasonably safe and adequate tools to meet and prevent what the Oregon rule describes as "those extraordinary risks arising through the negligence of the employer" which the employee does not "understand and appreciate".

We also submit that under the circumstances of this case the Ford jack was not a simple tool when compared with the chain, chisels and wedge of the cases cited by Defendant under this Specification.

Quanah A. & P. Ry. Co. v. Gray, 63 F. (2d) 410 (C. C. A.) Tex., holds at page 413: "there is no reasonable basis for the statement of a 'simple tool doctrine' as a doctrine or rule of law", in a case of a hammer, the wooden handle of which broke.

New York, N. H. & H. R. Co. v. Vizvari, 210 F. 118 (C. C. A.) N. Y., holds at page 121: "We do not think that a steel chisel used for cutting steel rails is a 'simple' tool within the meaning of the rule."

Nugent Sand Co. v. Howard, 11 S. W. (2d) 985 Ky., holds at page 986 that a ladder, "chicken ladder", was not a simple tool.

SPECIFICATIONS OF ERRORS, III, IV, V AND VI

(Def's. Brief page 46 et seq.)

What Defendant states to be the facts under the above numbered specifications are so utterly different from the facts in this case as shown by its own exhibits and testimony and all the undisputed evidence that Plaintiff will take no further time of this Court discussing them, but respectfully refers the Court to Plaintiff's Further Statement of the Case, Summary (b), (c), (d) and (e), and Argument under the head: There Was No Meeting of Minds, etc. Also, by way of professional interest we refer the Honorable Court herein to *John J. Craig Co. v. C. E. Chambers,* 13 Tenn. App. 570, decided March 28, 1931.

Wherefore, Plaintiff submits that the Judgment upon the Verdict herein should not be disturbed.

Respectfully submitted,

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FRANCIS I. SMITH,
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No. 9277

United States
Circuit Court of Appeals
For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JAMES RALPH HUNT, *Appellee.*

Appellant's Reply Brief

Appeal from the District Court of the United States for the District of Oregon.

JAMES ARTHUR POWERS,
Attorney for Appellant.

GEO. L. RAUCH,
Attorney for Appellee.

DAILY JOURNAL OF COMMERCE

SUBJECT INDEX

PAGE

Point (a). Reply to new question raised by appellee 2

Point (b), (b1) and (b2). Reply to appellee's contention concerning settlement 2, 9

Point (c) and (c1). Reply to appellee's contention that appellee was forced to do the work and that the work was extra-hazardous 2, 15

AUTHORITIES

PAGE

Anderson v. Hartford Accident & Indemnity Co., 152 Or. 505; 53 Pac. (2d) 710 ..... 9, 13

Blackhurst v. Johnson, 72 F. (2d) 644 ..... 2, 4

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1; 7 P. (2d) 796 7

Hoffman v. Broadway Hazelwood, 139 Or. 519; 10 P. (2d) 349 ..... 7, 8

Hyland v. Millers Nat. Ins. Co., 92 F. (2d) 462 ..... 2, 5

McDonough v. National Hospital Association, 134 Or. 451; 294 Pac. 351 ..... 9, 15

Merchants' & Manufacturers' Securities Co. v. Johnson, 69 F. (2d) 940 ..... 2, 4

Morrison v. Burnette, 154 Fed. 617 ..... 2, 4

Ocean Accident & Guaranty Corp. v. Rubin, 73 F. (2d) 159 ..... 15, 19

Ridley v. Portland Taxicab Co., 90 Or. 529; 177 Pac. 429 ..... 15, 18

White v. Consolidated Freight Lines, 73 P. (2d) 358; 192 Wash. 146 ..... 15, 18

Bouvier's Law Dictionary, Students Edition, 1928 7

29 Corpus Juris 236 7

Oregon Code, 1930, Section 49-1701-1706 5

Oregon Code, 1930, Section 49-1815 9

Webster's International Dictionary 7

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Appellant's Reply Brief

Appeal from the District Court of the United States for the District of Oregon.

APPELLANT'S REPLY BRIEF

A reply brief seems necessary because appellee has raised a new question in his brief, which is outside the points designated on appeal. Also the reply brief will attempt to sift out and classify appellee's contentions which appear at random in his brief. Appellee's contentions seem to be these:

(a) (New Point) That the appellant is deprived of its common law defenses because of the Oregon Workmen's Compensation Act;

(b) That the appellee, in receiving the various compensation checks and having his medical expense paid, cannot be said to have settled his claim because all drafts, except one, refer to the date of accident as June 11, 1934, instead of November 5, 1934; (b1) That all appellee intended to settle was his loss of wages while reserving his right to file an action for pain and suffering; (b2) That he only received $33.00 for his accident of November 5, which would not be enough to compensate him for his injuries;

(c) That the appellee was not aware of any danger in using the jack; (c1) That the Ford jack was a complicated and dangerous piece of equipment.

REPLY TO POINT (a)

This new point raised by appellee seems futile BECAUSE the law does not allow an appellee to raise a new point on appeal in the absence of taking a cross-appeal; (*Hyland vs. Millers Nat. Ins. Co.* (C.C.A. 9th 1937) 92 F. (2d) 462; *Blackhurst vs. Johnson* (C.C.A. 8th 1934) 72 F. (2d) 644; *Merchants' & Manufacturers' Securities Co. vs. Johnson* (C.C.A. 8th 1934) 69 F. (2d) 940; *Morrison vs. Burnette* (C.C.A. 8th 1907) 154

Fed. 617;) BECAUSE the new point is contrary to the theory upon which the case was tried; (R. 168 "The Court * * * So the matter will proceed as a common law action from here on * * *") BECAUSE it presents a new theory not raised by the pleadings or formulation of issues and concerning which appellant had no opportunity to introduce evidence (R. 168). MOREOVER the contention is specious since the Court below ruled as a matter of law that the work plaintiff was doing did not involve a risk and danger. Risk and danger being synonymous with hazardous work (R. 168). And finally, it has been held that even under the Workmen's Compensation Act, the simple tool doctrine is still applicable as a defense by the employer.

ARGUMENT

Appellee does not controvert appellant's statement of the case but makes an additional statement in which is included testimony of a witness (Ernest H. Coats) which was not in the record at the time appellant's brief was filed and which testimony by supplemental record was filed after appellant's brief had been filed herein, under an order of the District Court without notice to appellant. (See affidavit attached to appellant's Motion to Strike filed in this Court November 13, 1939.) This new matter has to do with testimony concerning the use

of compressed air which is pumped up with an electric motor at the filling station, and, in appellant's view, has no proper place under the points designated on appeal. It does, however, add confusion. As is seen from appellee's brief, the purpose of this additional testimony is to furnish factual material for the argument that appellant under the Workmen's Compensation Act of Oregon is deprived of its common law defenses. This new question cannot be raised in absence of cross-appeal.

Morrison vs. Burnette, 154 Fed. 617, 620:

> "The appellees have taken no appeal and they cannot invoke the jurisdiction of a federal appellate court to consider or decide questions of this nature by an assignment or by an argument of cross-errors."

Merchants' & Manufacturers' Securities Co. vs. Johnson, 69 F (2d) 940, 944:

> "* * in the absence of a cross-appeal, questions decidedly adverse to appellee will not be considered on appeal."

Blackhurst vs. Johnson, 72 F. (2d) 644, 649:

> "She (appellee) has, however, not appealed, and questions decided adversely to a party who has not appealed will not be considered on appeal. Appellees can be heard only in support of the decree which was rendered."

See also: *Hyland vs. Millers Nat. Ins. Co.,* 9th C.C.A., 92 F. (2d), 462, 464, which supports the rules announced in the cases above.

Outside of the fact that this new matter is contrary to the stipulation of counsel (R. 182) and Points Designated on Appeal (R. 185), the question of whether appellant was deprived of its common law defenses was decided by the District Court contrary to appellee's new contention. (R. 168.) Appellee in his complaint alleged the work he was doing involved a risk and danger and charged appellant with violation of the Oregon Employer's Liability Act. Sec. 49-1701-1706, Oregon Code 1930, R. 17). The District Court on motion of appellant at the conclusion of plaintiff's case held that work plaintiff was doing did not involve a risk and danger and that the Employer's Liability Act was not applicable (R. 168).

As will be seen from the record here, the within case, after the ruling of the Court during trial, was tried solely on the theory that it was governed by the rules of common law and that no statutory law such as the Workmen's Compensation Act was involved. The Court having ruled as a matter of law that the work plaintiff was doing did not involve a risk and danger within the Employer's Liability Act and as will be seen the District Court instructed the Jury under the law of the case that the defense of assumption of risk was available to the defendant. (R. 171).

> "* * * The defendant has pleaded another defense as it is allowed to by law in cases of this kind called assumption of risk."

And submitted the matter to the Jury as to whether there was danger in using the jack and instructed the Jury upon it as follows:

> "in changing the tire in this particular way was a danger or risk of the kind that the plaintiff knew and that he appreciated and understood (and if so) he would not be entitled to recover."

Counsel for appellee took no exception to this theory of the law as given in the Court's instructions. (R. 175):

"MR. RAUCH: We have no objection."

It was never before contended on such theory that appellant would not be entitled to its common law defenses nor that the assumption of risk doctrine was inapplicable.

The contention at this late date that work appellee was doing was a hazardous work under the Workmen's Compensation Act, is without merit.

The Employer's Liability Act has always been considered to be more comprehensive than the Workmen's Compensation Act. Attorneys in filing master and servant cases under the Oregon law follow the practice as was done in this case of charging a violation of the Employer's Liability Act rather than a violation of the Work-

men's Compensation Act and although the meaning of both acts as to the type of work which would deprive a master of his common law defenses, is the same as far as this case is concerned, yet the Employer's Liability Act has been considered to be and is more extensive. An illustration of this proposition, namely, that if the Employer's Liability Act does not apply that an employer's common law defenses are available to him, may be found in the cases of

Freeman vs. Wentworth & Irwin, Inc., 139 Or. 1; 7 P. (2d) 796;

Hoffman vs. Broadway Hazelwood, 139 Or. 519; 10 P. (2d) 349;

The Employer's Liability Act refers to the type of work involving risk and danger, whereas, the Workmen's Compensation Act refers to hazardous work. These words are synonymous. Hazardous has the same meaning as risk and danger. Webster's International Dictionary defines "hazardous" as "exposed to hazard; dangerous; risky;" and gives the synonyms of "perilous; dangerous." Corpus Juris gives the definition as follows: (29 C. J.236)

"HAZARDOUS. Exposed to or involving danger; perilous; risky." (citing numerous cases)

Bouvier's Law Dictionary, Students Edition, 1928, defines hazardous as "risky; perilous; involving hazard

or special danger." Such latter definition seems to suggest that hazardous implies more than ordinary danger and uses the words "special danger". In other words, a work that involved a risk and danger would be bound to be hazardous and in this respect the only difference between the two acts is that the Workmen's Compensation Act limits the hazardous work to particular classifications whereas the Employer's Liability Act has no such limitation and hence is more extensive. The mere fact that an employer rejects the compensation act is no evidence that the act is applicable to the particular work being carried on by the employer. See *Hoffman vs. Broadway Hazelwood,* in which case it was held that the Employer's Liability Act did not apply as a matter of law and headnote 6 states:

> "That employer rejects Compensation Act does not affect its applicability, and evidence of its rejection is immaterial upon that question."

It must be obvious and the Act itself recognizes that an employer may be carrying on certain work that would fall within the act and other work that would not fall within the act. This is particularly true of a concern such as the appellant Union Oil Company.

Heretofore appellee made no contention in his complaint, nor during the trial, nor in argument of the law on motions after trial that his work was hazardous within the meaning of the Workmen's Compensation Act, nor

that said act deprived appellant of its common law defenses, and in view of the fact that everything done and ruled on in the Lower Court is contrary to this new point it seems specious to try to raise it at this time on appeal.

Moreover the 1935 amended Workmen's Compensation Act cited and relied on by appellee in his brief was not the law in effect the time this accident occurred. If the Workmen's Compensation Act was applicable at all, which we submit it is not, it would be the earlier Workmen's Compensation Act and which was in effect during 1934 as it appears in Oregon Code of Laws, 1930, Section 49-1815.

REPLY TO POINT (b), (b1) and (b2)

Factual argument by appellee not supported by record.

AUTHORITIES

Record on appeal:

Anderson vs. Hartford Accident & Indemnity Co., 152 Or. 505; 53 Pac. (2d) 710;

McDonough vs. National Hospital Association, 134 Or. 451; 294 Pac. 351;

Appellee argues that the policy under which the major portion of the money was paid, expired on July 1,

1934, and therefore the company would have no liability under it for any accident that occurred on November 5, 1934. However, the fact is as is conceded by appellee's brief that appellants insurance carrier was advised by Dr. Dillehunt, who performed the fusion operation that the plaintiff's condition related back to his accident in June, 1934, and at a time that the policy referred to was in effect. The mere fact that it expired on July 1, 1934, would not relieve the company from liability for an accident that had occurred while the policy was in effect. A policy of insurance may expire but its expiration cannot relieve it from liability that occurred or accrued while the policy was in force.

Appellees back bothered him right along from the time of the June accident. He testified that after the June accident, his back continued to bother him. (R. 40):

> "Well, it was a constant pain there. If I would strain myself the pain would go up from my back and it would ache, I would have to sit down and rest, and it made me irritable, and there was always a dull ache right between my hips."

The appellee's testimony fits in with what he told the insurance adjuster, who testified (R. 132):

> "Q. And did Mr.—what did Mr. Hunt tell you, if anything, about the occurrence there on November 5th, 1934?

"A. Mr. Hunt explained that he had had a recurrence of an injury that he had had in June, I think it was June the 11th, 1934.

"Q. What, if anything was said about an operation?

"A. He said they had talked to Dr. Dillehunt and he had recommended a fusion operation."

The record shows that after the insurance company undertook to pay the appellee the benefits of the compensation act that they indicated on the first two drafts that the injury resulted from an accident on November 5, 1934. A notation on one of the drafts was then changed to show that the injury resulted from the accident of June, 1934, and all subsequent drafts referred to the accident as of June, 1934, the record shows the reason for the change was that the doctor who performed the operation advised the insurance company that it was necessitated by the June accident (R. 142). That appellee had a chronic weak back is shown by his own testimony. He had to wear a brace after the June accident until after the operation was performed and his back was made strong enough to enable him to discard the brace entirely. There were no compensation payments made to the appellee himself until after he entered the hospital in the early part of 1935. There was a bill for medical services

paid to a Dr. Simmons but no bill up to that time was paid to Dr. Dillehunt, the surgeon who performed the operation, and the surgeon under whose care appellee was after the June accident. When Dr. Dillehunt's bill was paid, it was paid in one lump sum of $414.50. This included all the services which he had performed for appellee which began in June, 1934, including the special steel brace which Dr. Dillehunt had made for the appellee (R. 161, ex. 33). It was this doctor's opinion that the appellee's trouble originated in June, 1934, (R. 160 ex 33) that he was going to have this constant trouble with his back unless he had an operation. That is the reason that the charges here were made against the insurance policy which was in effect in June, 1934. The record shows it did not make any particular difference to the insurance company as to which policy it would charge these payments. The insurance company had identical coverage for both periods involved. One policy simply went into effect upon the expiration date of the other. They were identical in terms and conditions except that one policy (ex. 26) covered the Union Service Stations, Inc., a subsidiary of the Union Oil Company, which ceased to do business July 1, 1934, when the Union Oil Company took over all its assets and liabilities. The other policy (ex. 27) was in favor of the Union Oil Company. Both policies covered the identical operations and the

identical employees at the station where appellee was working. Appellee had been employed by the Union Service Stations, Inc., until July 1, 1934, when the assets were taken over by the Union Oil Company. He continued working at the same service station for the Union Oil Company. Appellee disregards the fact that the record shows that after appellee's operation to strengthen his back, he was able to discard the back brace and go back to work, reporting to the operating surgeon that he was free from pain (R. 161 ex 33) and that appellee, two years after the June, 1934, accident made a written application for insurance representing that he was fully recovered and related his prior trouble to June, 1934 accident. (R. 148, ex. 1) and yet argues in the brief that he is entitled to some compensation for a permanent disability.

Outside of the fact that such contention runs squarely against the doctrine that a person cannot split his demand or cause of action, he is faced with the provision for medical arbitration contained in the policy. Compliance with this provision was held by the Supreme Court of Oregon to be a condition precedent to any action. *Anderson vs. Hartford Accident & Indemnity Company,* 152 Or. 505; 53 Pac. (2d) 710.

If Appellee here has any permanent disability he has the right under the terms of this policy, admittedly the policy under which the insurance company made payment

and which appellee accepted payment, to demand a medical arbitration and have determined the question of whether he has any permanent disability. The policy gives the appellee a direct right of action against the insurance company. This policy is made for his special benefit as an employee of appellant; he has accepted very substantial benefits amounting to $820.65 (R. 153) and if the appellee is entitled to any further benefits as measured by the State Workmen's Compensation Act, he has the right under his agreement with the insurance company to demand these directly under this policy from it; and if in fact there were any such permanent disability, it could be determined by the medical arbitrators provided for. Such medical arbitration would be a condition precedent to any action against the insurance company. This as a reasonable provision and tends to take the element of chance out of cases of this kind. It is of definite benefit to an injured workmen. It provides a fair and speedy remedy as to the extent of injuries or the permanency of injuries through medical arbitration in the event of a dispute between the parties. Appellee in his brief, continues to speak of "loss of time"; that he thought he was getting paid for loss of time. This contention is also at variance with the record because the appellee stated, himself, on the witness stand that he went to the insurance company to see what they would do about his condition and that he

understood that he was to get his medical and hospital bills paid and to receive compensation—certainly this was something more than loss of time where his medical expenses were paid for him in the sum of $585.35. Moreover it doesn't matter whether this money was paid under one policy or the other. Or for that matter, it wouldn't alter the situation if the money was paid even by some third party. Oregon Supreme Court has held this in the case of

McDonough vs. National Hosp. Ass'n., in which case the Court states: (P. 455)

> "The general rule is that when a plaintiff has accepted satisfaction in full for an injury done him, *from whatever source it may come,* he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages;"

REPLY TO POINT (c) and (c1)

AUTHORITIES

Ridley vs. Portland Taxicab Co., 90 Or. 529; 177 Pac. 429;

White vs. Consolidated Freight Lines, 73 P. (2d) 358; 192 Wash. 146;

Ocean Accident & Guaranty Corp. vs. Rubin 73 F (2d) 159;

ARGUMENT

Appellee injects a good bit of factual argument in his brief which is not supported by the record. He argues that because of the sales pressure put on the appellee that appellee had to change this tire. The record shows (R. 50) that appellee could have had another station take care of the work and that he didn't do this because he said he wanted the business himself under a quota system. There is no basis in the record for the contention that he was forced or driven to do this work. It was optional with the appellee whether he would do it or not. He merely had to step to a telephone if he didn't want to do it and have it done by a closer station. It is also to be noted from the record (contrary to his now claimed pressure) that he was instructed not to do any heavy work (R. 39) appellee stated after his June accident that he returned to work "with instructions that I was to do light, easy work." (R. 39) There is not a word in the record that anyone ever asked him to do any heavy work. He did only what he himself undertook to do and doing the particular work at the time of the accident if it could be considered heavy work, was directly against the instructions given to him by the doctor. The record, instead of showing any pressure brought on the appellee to do heavy work, shows that he was favored.

Counsel, in trying to overcome the rule that an em-

ployee assume the ordinary risk, finally takes the position that using the Ford jack involved an extraordinary risk and danger, he claims in his brief (p. 72) that this jack was "most highly and dangerously complicated". Presumably he wants this Court to infer therefrom that the appellant, his employer, had some secret knowledge about appellee's jack which he, himself, did not have. Appellee's argument continues along the line that the appellee himself did not know that the jack was dangerous to use, that he thought it was safe to use. It is difficult to conceive of a tool that has been in more common use during the past several decades than an ordinary lever type Ford jack. It is common knowledge that when an automobile is sold, part of the standard equipment that goes with the car is a jack to be used in raising the car in changing tires. In days not long past, anyone driving a car any distance at all might expect to change one or a good many tires. No special instructions came as to the use of a jack. The type involved here worked on the simple leverage principle. Moreover it appears from the record that nothing was defective about the jack itself. As pointed out in the original brief herein the manner in which this accident occurred is left entirely to speculation and conjecture. For that reason alone there was no evidence to support a verdict herein for the appellee. Appellee testified that the car simply slipped off the

jack and later when the other filling station attendant came from the other station, it was his testimony that he found the jack underneath the car and that he went ahead and used it for the same purpose that appellee was using it and this was done without any difficulty or trouble. (R. 91) In the case of *Ridley vs. Portland Taxicab Co.,* 90 Or. 529; 177 Pac. 429; an employee operating a taxicab at night when it was dark found it necessary to change a tire. He was unfamiliar with the tools and was working in the dark and he sustained an injury. The Supreme Court held that he was not within the Employer's Liability Act and in doing so necessarily recognized the fact that there is nothing hazardous or dangerous about using tools in changing a tire on a car. In the instant case it seems clear that such doctrine is all the more applicable as the tire was being changed by a man who had been doing this type of work for at least a year. The work was done in the daytime; it was daylight; he was not working in the dark and with strange tools as was the situation in the Ridley case. Appellee had a choice of what tools he was going to use and he used his own tool. The Supreme Court of Washington followed the Ridley case in *White vs. Consolidated Freight Lines,* 73 P. (2d) 358, holding that the Oregon Employer's Liability Act did not apply to an injury to the driver of a large truck and trailer through an accident caused by defective light-

ing equipment thereon which failed. This Court in the case of *Ocean Accident & Guaranty Corp vs. Rubin,* 73 F. (2d) 159, took judicial notice that changing automobile tires might be incidental to any kind of work and seems to recognize the proposition that there is nothing particularly dangerous in changing an automobile tire on a highway. In any event as pointed out in appellant's original brief the Court, in instructing the Jury, erroneously stated the law respecting the assumption of risk doctrine.

Respectfully submitted,

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